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# RETHINKING THE SENATE

- *A Discussion Paper* -

The Attorney General of Ontario

February 16, 1990





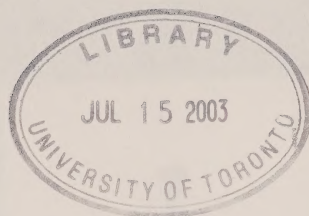
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## **SYNOPSIS**

This discussion paper identifies a range of possible issues that surround the current interest in Senate reform. Together with an extended appendix of background information relating to the upper house, it is intended to assist the public inquiry of the Ontario Select Committee on Constitutional and Intergovernmental Affairs.

The paper draws a distinction between the current Senate, which many consider inappropriate, and the continuing value of second chambers in a parliamentary system in representing interests not adequately reflected in a lower house. In considering what it is that a reformed Senate could or could not achieve, the paper notes that second chambers are optional; they are distinctive in the sense that they represent interests not adequately represented in the lower house; and, because they act as a constraint on the population-based lower house, they are secondary. Although there has been an historic failure of our Senate to promote regional accommodation, other constitutional, parliamentary and intergovernmental arrangements have emerged to address this failure in part. However, regional interests might be better articulated within a regionally based second chamber than is the case through current arrangements.

Senates -- current or reformed -- do not operate in a vacuum. First, they need to respect fundamental values in Canada, including linguistic duality, unity in diversity, equality and global competitiveness. Second, a reformed Senate would also need to recognize the structure of parliamentary government, particularly Canada's tradition of a strong cabinet with the responsibility to execute broadly-based measures. The future impact of two elected assemblies, one whose possible veto power might not be disciplined by a national party system warrants consideration. Third, the compatibility of a reformed Senate with our federal system and the balance of federal and provincial powers will need examination.


Finally, thought should be given to possible unintended consequences of Senate reform, particularly the influence of political parties in a reformed Senate. The need to reconcile the purpose of Senate reform with the broader context is worthy of wide-ranging study before firm conclusions are reached.





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## I INTRODUCTION: THE NEED FOR CHANGE

Born of protracted debates among Canada's Founding Fathers, our Senate has now endured more than a century of periodic challenge to its composition, role and powers. Its august setting, placid debates and low public profile belie the complex and multiple functions expected of it and the real powers it may exercise over the federal legislative process. Throughout its history, the Senate has been the focus of often conflicting expectations, some of which are at odds with contemporary norms of democracy:

- At Confederation its purpose was to protect the interests of property and check the excesses of the Commons' mass democracy by exercising a "sober second thought" on all legislation.
- In addition, the Senate was seen as a forum for the expression of regional interests and seats were allocated on that basis.
- With Senators selected by the Prime Minister and originally appointed for life, the Senate acquired a partisan character, at times out of step with changing party fortunes in the Commons.
- For many years, membership was drawn predominately from a male constituency, aligned with Canada's two major national parties and largely confined to our two founding linguistic cultures.
- As an appointed body, it lacked any accountability to a popular constituency but enjoyed responsibilities similar to those of the Commons: the Senate must approve all Commons business for Royal Assent to be granted and a law proclaimed.

Whatever its initial justification or evolving status, the Senate is now widely regarded as an anachronism in Canada's political system. There is a consensus that the Senate should not continue in its present form; a task force of the Manitoba Legislature, for example, has recommended consideration of broad reform including abolition, if reform proves impossible.

The Ontario Legislature recently established an inquiry on Senate reform through its Select Committee on Constitutional and Intergovernmental Affairs. This paper does not seek to provide a perspective or position on behalf of the Ontario government. Rather, the intent is to assist the public process by suggesting a range of issues that surround the interest in Senate reform. Readers will find here not an argument for or against Senate reform but rather a series of questions which might be addressed in considering Senate reform and an examination of the context in which Senate reform might take place.

This paper proceeds as follows:

- Section II begins with an examination of the Senate's current composition, role, and powers and presents the contemporary difficulties with each. The Section then explores the roles performed by second chambers and concludes by asking whether a new upper house could complement the existing mechanisms for the expression of regional interests in Canada.
- Section III considers the range of interests that would be affected by any attempt to reconstitute a second chamber. First, what are the broad national values that will underpin Canada's government in the twenty-first century? Second, what are the requirements of our parliamentary and federal systems which might set tests for any Senate reform proposal?
- Section IV looks at the practical business of designing a new second chamber and asks about unintended consequences; in particular, what would be the effect of party discipline being extended to a new Senate?
- Background material included with this paper describes the role and history of the Senate, surveys reform proposals and briefly describes upper houses in other federations.



Without prejudging or prejudicing the work of the Ontario Select Committee, it can be affirmed here that Ontario supports the process identified by First Ministers to renew Canada's Parliament in the context of strongly held regional concerns. That the continuation of the Senate, as presently constituted, cannot be justified is an observation we share with those who propose reform; examining the rationales for a new Senate is the focus of Ontario's legislative inquiry and this discussion paper. Whatever the institution or process eventually proposed or agreed to, there should be no uncertainty as to Ontario's full contribution to finding the political system most appropriate to Canada's 21st century.

## **II ASSESSING PARLIAMENT'S SECOND CHAMBER**

This section examines the case that has been made for having a second chamber in Canada. It begins with an examination of our current Senate and reviews opinion on whether the purpose, if not the practice, of the upper house remains valid. Next follows an examination of the case for second chambers in general. The section concludes with an exploration of the arguments for reconstituting our Senate along explicitly regional or provincial lines.

### **a) The Current Canadian Senate**

In analysing or reconstructing a second chamber, it is useful to distinguish among its composition, role and powers.

#### **Composition**

Senators are selected on a basis that is both regional and partisan. Any British subject with nominal property holdings may be appointed Senator by the Prime Minister at his pleasure. Senators are eligible to sit, without recall, until compulsory retirement at age 75. Each Senator is appointed to represent a province. The number of seats allocated to each province is not equal: each of four regions receive 24 seats (Maritime, Ontario, Quebec, Western) and, within the Maritime and Western regions, each province

is allotted six seats, except for Nova Scotia (10), New Brunswick (10), and Prince Edward Island (4). Additionally, Newfoundland has six seats and the Territories one each. Thus, the 104 seat Senate is based on principles of both equal (regions) and weighted (provinces) representation. In reality, of course, as most commentators have noted, the sense of partisan affiliation prevails over that of region in the work of the second chamber.

### Role

A number of roles have been attributed to the Senate, including the detailed study and revision of legislation, the conducting of inquiries, and the representation of regions and special interests. In addition, the Senate has dealt with private legislation, although this role has decreased in importance with the passage of modern divorce and corporation statutes. Among these roles, the Senate has been active primarily in its functions of investigation and revision of legislation.

Senate committees have conducted special investigations in a number of areas, including land use, science policy, soil degradation, poverty, consumer credit, delegated legislation and the mass media. Many of these reports have received favourable comment and their recommendations have sometimes influenced legislation in these areas. In addition, the Senate has played a behind-the-scenes role tidying up details of legislation and correcting technical or drafting errors that were neglected in the more politically charged and rushed atmosphere of the House of Commons and its committees.

This last function may have become less necessary in recent years with the greater number and types of Commons committees and better legislative support to Members of Parliament. Nonetheless, the modern function of "sober second thought" has its defenders. In particular, they point to the expertise developed by the Senate in certain areas, as illustrated by the work of the Senate Committee on Banking, Trade and Commerce. The matter of review or sober second thought is not, however, without an element of controversy. In recent years, the Senate threatened to reject Investment Canada as a replacement for the Foreign Investment Review Agency, it failed to pass the Meech Lake Accord, forcing a repassage in the Commons and it was perceived to have forced a national election on the Free Trade Agreement with the United States.



### Powers

The Senate's powers have the potential to provoke public debate in our current democratic climate. Although it performs "sober second thought," this role is buttressed by significant power. The Senate must also pass the legislation approved by the Commons and it may amend or refuse to pass particular clauses or whole bills. The Cabinet may introduce the same or an amended bill in the Commons to try again, but without eventual Senate consent, a bill does not become law.

The thought of an appointed Senate (holding permanent office) possessing a full veto offends many who believe democratic legitimacy and accountability should be the fundamental principles underlying any parliamentary institution. It should be noted that Senators are acutely mindful of this incongruity and have not formally exercised their veto since 1939; for the most part, the Senate has generally not put itself in the position of frustrating the will of the popularly elected chamber, with exceptions such as those noted above.

However worthy this self-restraint, it nonetheless reveals the crisis of purpose facing Senators: unrepresentative, unaccountable, unrestrained -- what should their role be in Canadian politics? Is it appropriate to have an upper house occupying a critical stage in Parliament's policy making when its role may be redundant and its legitimacy fundamentally in doubt?

In conclusion, examination of the composition, role and powers of the current Senate leaves the following impressions. Although it was conceived on the premise that a single-chamber Parliament -- together with the executive -- could not adequately reflect Canada's diverse constituencies or adequately refine national public policy, the Senate has been criticized as follows:

- it lacks democratic legitimacy;
- it has not functioned as the intended forum for regional or minority representation;
- its partisan bias may only duplicate -- or, on occasion may neutralize -- the partisan character selected by Canadians for the Commons;

- its focus on property, privilege and permanence in its composition is inappropriate for Canada's next century.

The current Senate has its supporters as well as critics; the question is whether the costs outweigh the benefits.

- o **Given the acknowledged deficiencies of the current Senate, are there nonetheless reasons for retaining it?**

b) What Do Second Chambers Do?

While there is likely a consensus that the current Senate is inappropriate, the reasons may have more to do with its composition and powers than its purpose. It may be that the notion of "sober second thought" -- a body serving as a point of further reflection over the action of the Commons -- should be retained as a strength of policy making in Canada. It might further be affirmed that the aim of a second chamber, representing a constituency not adequately represented in the House of Commons, remains a valid objective. Although there might be means other than Senate reform for achieving these purposes, this paper concentrates on the issue of whether a new upper house is a possible solution. What is it that a second chamber could or could not do?

Second Chambers Are Optional

There may be an inclination to replace the outgoing Senate with a new second chamber largely because of the strength of tradition, i.e., that Canada's Parliament has always been bicameral and should remain so. Although Britain has retained its House of Lords and the non-elected, largely propertied bases of its selection, and Australia has an elected upper house within its parliamentary system, parliamentary government does not require two assemblies. Indeed, the five Canadian provinces that once had upper houses have long since abolished them. Thus, thinking about a new upper house should be a forward looking exercise, mindful of the arrangements of Confederation but attuned to the requirements of government in the 21st century: to be more open, more responsive,

more plural, more rights-conscious. To take stock of our history and our future, it might be asked:

- o **Given the role of the House of Commons as the focal point of Canada's democratic system, is there a need for a new second chamber in Parliament?**

### *Second Chambers Are Distinctive*

It may not be appropriate to decide on the legitimacy of second chambers based solely on tradition; one ought to look at their possible utility in the future. As a component of the parliamentary form of government, second chambers are intended to represent constituencies or values deemed to be under-represented in the design of the lower house. Canada has a democratic legislative body: in the House of Commons. Members are selected through the first-past-the-post electoral system to represent single member constituencies. These constituencies are distributed according to the democratic principle of representation by population. The government is responsible to this chamber and must command majority support to enact legislation. In this way, it might be argued, all Canadians are ensured an equal opportunity to participate in deciding who will govern them; the accountability of the government is guaranteed by scrutiny in the House of Commons and by the requirement of periodic elections.

There is a need to examine more closely the operation of the House of Commons. While it is undeniably drawn from a popular nation-wide constituency, it may be that the electoral process or the distribution of seats tend to amplify the influence of certain groups in society and to diminish that of others. Consider the following:

- The first-past-the-post system makes it difficult for representatives of smaller parties to get elected and has, at different times, contributed to the failure of even national parties to obtain sufficient votes to win seats in certain regions.



- Minorities may be consistently outvoted if their interests diverge from those of the majority; regions, languages and cultures may feel permanently dispossessed in the politics of the Commons.

There are, of course, various ways to protect people whose voices may be muted in the majoritarian setting of the House of Commons. Through the division of powers, some matters may not be addressed by the Commons at all. Federalism itself restricts the scope of the national government, allocating significant powers to provinces, where regional groups that are a minority in national politics can enjoy majority status in provincial politics. In recent years, group identities have been based not only on region but on gender, ethnicity, aboriginal status or socio-economic class as well. Since 1982, this dynamic has been recognized by the *Charter of Rights and Freedoms* which places limits, enforced by the courts, on the powers of the majority. As well, Canada has a tradition of respect for minorities and a willingness among citizens to foster diversity and share among themselves.

Alternatively, the problem of minority influence may be addressed in Parliament itself. A second chamber is a common, though not the sole, method available. It may enable certain identities that are in some sense under-represented in the House of Commons to be given a greater voice in national decision making.

- o **Are there segments of Canadian society whose interests are not adequately represented or protected in the majoritarian setting of the House of Commons?**
- o **If so, what other institutional devices or practices are available to represent and protect these interests; in particular, could a second legislative chamber play such a role?**
- o **If consideration should be given to a new second chamber, what constituencies could it represent and what functions could it serve?**

### Second Chambers Are Secondary

The function of a second chamber most commonly is to compensate for the perceived limitations of a majoritarian chamber like the House of Commons. Because the effect is to constrain the popular assembly, second chambers frequently have fewer powers (usually they cannot initiate tax or expenditure bills) and their actions may be subject to override by the lower house. This caution reflects the importance of the democratic principle that each citizen is equal. Any departure from majority rule is also a departure from this principle. Second chambers that give equal representation to regions of significantly different populations imply unequal representation of the individual citizen in those regions. While there may be grounds for such a practice, the prospect and operation of a new upper house requires the most stringent testing because a democratic principle of one person, one vote is perceived to be qualified.

By way of contrast, federalism is more sensitive to this dilemma than bicameralism because through a division of powers it attempts to give national minorities a majority status at the provincial level, thereby sustaining majoritarian politics in both orders of government. Clearly this is not a solution of infinite capacity though; it would eventually erode the base for a common national purpose.

- o **Does an upper house based, for example, on the "federal principle" of the equality of regions challenge the "democratic principle" of equality of citizens?**
- o **Are safeguards or limits on the role or powers of the upper house appropriate?**
- o **If so, do existing reform proposals contain adequate safeguards or limits?**

c) A Response to Regionalism

Ensuring better representation for less populous regions is the principal objective of most proposals for Senate reform. The thrust of the concern is that the interests of these regions are inadequately protected within the House of Commons in particular, and within Canadian federalism in general. Consequently, an assessment of these proposals should begin with an assessment of the existing mechanisms of regional accommodation.

The Extent of Regional Accommodation

When assessing a claim by regionally defined interests for enhanced recognition in a second chamber, one should first ask what mechanisms of regional accommodation already exist within Canadian federalism. Although a full answer to this question is beyond the scope of this paper, it might be helpful to identify the most significant of these mechanisms.

- The Constitutional Division of Powers

The allocation of jurisdiction between federal and provincial governments is an important means of recognizing regionalism in Canadian federalism. Decisions in areas of provincial jurisdiction are made by provincial rather than national majorities; this decentralization of authority allows for different policies across the country. More so than in most federations, Canadian provinces have very extensive powers (health, education, welfare, natural resources). Attempts to centralize them have sparked a lively sense of provincial autonomy at a time when other nations are evolving strong national policies in these areas.

- First Ministers' Conferences

These conferences operate on the basis of the equality of governments and provide a forum for discussion of areas of mutual concern and jurisdictional or policy overlap. They provide an opportunity for the premiers to promote regional and provincial interests and to express their views about federal government policies, including those falling within exclusive federal jurisdiction, in private discussions or before a national audience.



- Intergovernmental Contacts and Negotiations at Ministerial and Bureaucratic Levels

While First Ministers' Conferences provide periodic adjustments to the regional-national balance, intergovernmental relations established around specific programs facilitate day to day opportunities for mutual respect among governments.

- Regional Balance in Supreme Court of Canada Appointments

It is a well-established practice that the membership of the ultimate arbiter of Canadian federalism is drawn from across the country.

- Measures to Promote Fiscal Equity Across Regions in Canada

The recognition of regional economic disparities has a long history and is now a constitutionally entrenched commitment to equalization payments. This mechanism addresses regional disparities within Canada by transferring funds to economically disadvantaged provinces.

- The Tradition of Powerful Regional Spokespersons in Cabinet

The selection of a regionally balanced Cabinet and the designation of specific ministers as advocates for their province ensures that representatives of the regions participate in central government decision making at the highest levels.

- Regionalism Expressed Through the Party System in Parliament

Brokerage of regional interests is an important function of national political parties in Canada. Even though members of a party will participate in the procedures of Parliament on party lines, within their own caucus and occasionally across caucuses there is increasing evidence of advocacy of regional identities.

This catalogue should remind us, then, that there are various formal and informal means presently in place by which regional interests are articulated within Canadian federalism. It can be seen from the preceding list that regional interests have been expressed through constitutional, parliamentary and intergovernmental means. Many of these practices were developed in the context of a Senate unable to serve as a forum of regional representation.

- o **Are the existing mechanisms of regional accommodation within Canadian federalism inadequate? If so, in what way?**

- o **Could any current defects in regional accommodation be cured by enhancing existing mechanisms or through new approaches other than the reform of a second legislative chamber?**

#### *A Second Chamber For Enhanced Regional Representation?*

Advocates of Senate reform will usually agree that there is already a long Canadian tradition of accommodating regional interests, whether by parliamentary or intergovernmental devices. Constitutional reforms of 1982 and 1987 have also been significant in securing the interests and equality of provinces. Despite these features of Canadian federalism, it is frequently claimed that regional interests could be better articulated within a regionally-based second chamber than they can through current constitutional, parliamentary or intergovernmental means:

- The constitutional accommodation of regional diversity through the division of powers cannot alone address all regional concerns. There remain many areas of exclusive federal jurisdiction where decisions of the central government can have significant consequences for particular parts of the country. Furthermore, the costs and benefits of these policies may be borne unequally by different regions. The concern voiced by some proponents of Senate reform is that these decisions will be unduly influenced by the interests of the regions that, by virtue of their large populations, elect a significant proportion of the Members of Parliament. A new second chamber might complement the constitutional protection of regional interests through the division of powers by strengthening the influence of less populous regions in policy making at the federal level.
- Concerning Parliament, the argument is made that regional ministers and caucuses, regardless of their effectiveness in injecting regional perspectives into national decision making, are pre-empted by party discipline and the need for a broad popular base. As a result, regional advocacy within national parties and the Cabinet often takes place behind closed doors, and the opportunity to voice a

regional perspective at all is vulnerable to the vagaries of electoral fortune which may leave a region with little or no representation among the Members of Parliament of one or more major parties. Senate reform thus may provide a more secure and visible vehicle for the expression of regional concerns in the policy process.

- As for intergovernmental relations, reformers recognize that although the provinces are well-established advocates of regional interests in Canada, provincial governments frequently represent regional concerns in competition with the federal government. This arises in part from the fact that provincial responses to federal initiatives may be shaped by the perceived need to defend their constitutional positions. The result is a tendency to cast policy disputes in jurisdictional terms. One argument for a new second chamber is that it offers the potential for the expression of regional concerns within, not in competition with, federal government institutions.

The claim of under-representation has to be carefully tested if the proposed solution lies in an upper house, for the effect of such a solution could be to lessen the influence of the Commons.

- o **What specific defects in regional representation are targeted by reform proposals? Will the desired objectives be achieved through a second chamber?**
- o **Would a regionally based second chamber complement (or detract from) existing means of regional accommodation in ways other than simply enhancing the representation of less populous regions?**

The discussion in this section has set out the types of questions that could be asked in evaluating the rationale for replacing the Senate with a new second chamber. Even if this analysis suggests that the idea is a good one, governing institutions are rarely



devoted to a single purpose or constituency. The next section considers the broader context in which a new second chamber would be created.

### III EXPLORING THE BROADER CONTEXT FOR A NEW SECOND CHAMBER

Although generally proposed as a way of improving regional accommodation in Canada, Senate reform cannot be assessed only on this basis. Institutional change of this magnitude is likely to affect the political system and balance of values in Canada. Any proposal for a new second chamber should be evaluated in terms of both its particular objectives and its broader implications. Three fundamental perspectives that merit consideration are:

- a) shared national values;
- b) the parliamentary system; and
- c) the federal system.

#### a) Shared National Values

Constitutional reform unavoidably touches upon the basic values of Canadian society. These values, in turn, reflect the challenges and traditions of governing a large and diverse nation within the framework of a democratic political system. In most cases, the rationale for a second chamber will involve an appeal to principles such as "respect for regional identities" or "protection of minorities." Understanding and evaluating these principles is important; it is equally important to understand the broader set of values embedded in Canada's Constitution and practices of government.

The focus in this section is on the wide range of values that may be affected by the creation of a new second chamber. These values are relevant not so much to the **purpose** of reform as to the **context** in which it must be evaluated.

- o **If regional accommodation is to be improved by constitutionally entrenching this purpose in a new second chamber, what social and political values are likely to be affected?**
- o **Assuming that one or more values will be affected, will the net result be positive or negative?**

To illustrate the first question, three categories of values are considered: unity in diversity, equality, and global awareness.

### *Unity in Diversity*

A continuing challenge for the politics and institutions of Canadian federalism has been to achieve a balance between the need to reinforce national unity and the recognition and fostering of diversity. Accommodation of these sometimes competing values is a primary objective of any federal system of government.

Canadian unity requires effective national government able to command the loyalty and support of citizens from all regions and to act on their behalf. The capacity for central decision making is especially important in policy areas that are inherently national in scope; in recent years, Canadians have been vocal in their concern about proposals that would weaken national programs. National objectives cannot be achieved, however, at the expense of the respect for diversity and sensitivity to regional interests that are central to federalism. Proposals for a regionally-based second chamber focus primarily on the place of diversity in determining national policy. In evaluating these proposals, achieving the right solution will necessarily be a matter of balance between these two perspectives.

- o **Would a new second chamber adequately reflect the value of unity in a diverse nation?**

## Equality

Recent constitutional reforms in particular have emphasized the principle of the fundamental equality of individual Canadian citizens. This principle has several different applications and extends as well to claims made by collectivities. Manifestations of the equality principle include the following:

- Democratic Equality

This value underlies elections based on one person one vote and representation by population as found in national and provincial legislatures.

- Legal Equality

The Charter not only contains formal equality provisions but also guarantees the rights contained therein to all Canadians. This legal element of equality is complemented by an active public interest in enlarging the range of common rights or entitlements across Canada which are viewed as incidents of citizenship.

- Economic Equality

The economic principle is illustrated by universal social security programs. It is also reflected in equalization payments which, although entitlement is territorially defined (i.e. transfers are made to provinces), reflect the underlying principle that Canadian citizenship should entitle everyone to a basic standard of public services at an approximately equal tax burden.

- Equality of Collectivities

Within the Canadian tradition there are also elements of equality based on collective rather than individual identity. Equality among linguistic groups is reflected in the concept of "duality." Equality of territorially defined political entities is also evident in the equal status of government leaders at First Ministers' Conferences. The equality of regions or provinces is frequently advocated in design of second chambers.

Equality is thus a multidimensional value which has a central place in Canada's constitutional fabric. While it is appropriate to talk of "equality" in the context of a new second chamber, in the Canadian context different facets of this concept may coexist. For example, the Constitution Act, 1987, when proclaimed, will affirm as a fundamental



characteristic of Canada the existence of Canada's two founding linguistic cultures. If regional or provincial identity were to become a basis for representation in the Senate, this duality and Quebec's distinct society would influence the design of new national institution.

- o How will the different aspects of equality that are important to Canadians be reflected in a second legislative chamber?**

### *Global Awareness*

In a rapidly changing and increasingly interconnected global environment, Canada must be able to respond effectively to international developments that affect its interests. In areas as diverse as international debt, fisheries management, trade and environmental protection, events in other parts of the world can have a significant impact on Canada's domestic interests and policy objectives. This requires a national government able to speak with one voice and act decisively on behalf of the country as a whole.

At the same time, it is clear that international developments may have serious and disparate impacts on regional issues and interests. Further, these events may touch directly on matters within provincial jurisdiction. Addressing this aspect of the problem requires, in the Canadian tradition, sensitivity to the regional dimension in formulating Canada's response. Traditionally, this sensitivity has been achieved primarily through intergovernmental consultation, especially where areas of provincial jurisdiction are affected. Facilitating this regional input in areas of federal jurisdiction could be one function of a new second chamber.

- o Would a regionally based second chamber enhance or hinder Canada's ability to respond effectively to the challenges of global interdependence?**

As these examples illustrate, the Constitution is both a statement of principles and an institutional blueprint for Canada. In assessing the institutional implications of a new

second chamber, it is arguable that the most important questions centre on its place within the parliamentary system.

b) The Parliamentary System

The practical effect of introducing a powerful Senate into Canada's parliamentary system could be to render Cabinet accountable to two houses and thus to transform its operation into a brokerage process more similar to the American congressional system. Why should this be important?

The distinction is not insignificant. The parliamentary and congressional systems are quite different in their treatment of political power, the purpose of legislators and their openness to collective or special interests. Canada concentrates power in the executive in order to make responsibility difficult to evade; by doing so, we cultivate government with a high sense of accountability. The American tradition is to distrust such concentrations and to disperse authority among the Presidency, the House of Representatives, and the Senate, each constituting a check and balance on the function of the other. In Canada, the responsibility to govern clearly resides in the executive; it can be confident of majority legislative support through party discipline. In the United States, allegiances are more diffuse and less certain: the President must work along with the particular interests in Congress to attempt to assemble a majority on each proposal as it is submitted.

It may be that a parliamentary system, dominated by Cabinet, enables the executive to express more easily a public interest beyond party or special interest. Where there is a powerful executive, as in Canada, there is also the ability and responsibility to plan and carry through a comprehensive policy agenda. Electoral calculations require Cabinet government to seek support across a wide range of interests, beyond one party or special causes. This could account for Canada's broadly based welfare, health, pension and family support schemes. By way of contrast, the more independent legislator

of the congressional system may be more prone to influence from special interest or powerful lobbies. Thus, in the United States, with its premium on political brokerage, even if coherent policy initiatives do emanate from the President's office, there is no guarantee that such initiatives will survive intact, or at all, at the end of the political process. In short, Canada has executive-centred government; America is legislature-centred. Senate reform could introduce a potentially incompatible element into our executive-centred parliamentary process.

What, then, would be the result for Canada's parliamentary tradition? Could Senators acquire an independence similar to American legislators with the susceptibility to powerful interests as well? Would Cabinet enjoy the same ability to carry out a coherent agenda if faced by two active Houses, one with a veto power possibly undisciplined by national party affiliation? A noted Canadian parliamentarian has said that the concentration of power in Cabinet and the competition of parties for election provide a powerful means of asserting collective interests over the particular. Making Parliament more legislature-centred could make it more vulnerable to powerful particular interests.

This discussion does not mean that a reformed Senate cannot be integrated into Canada's parliamentary system. Nor should it be read as suggesting that no alteration in the operation of the federal government and parliamentary institutions is possible. Nonetheless, it indicates that proposals to replace the Senate must address the following general questions:

- o Would a reformed second chamber be compatible with Canada's system of responsible parliamentary government; in particular, could there be a move towards a more congressional system of government in Canada?**

The issues for parliamentary government raised by a reformed Senate also include the question of what powers a regionally based upper house should have to influence or check the majoritarian party preference of the Commons. Party discipline might be



optional in the congressional system because executive and legislative interaction is governed by mutual obligations based on formal checks and balances. In Canada, party is vital to the relationship between the executive and legislature. Parties also fashion broad, consensual policy agendas for voters and government alike. Given that parliamentary parties are essential to enable an executive to govern with the support of a population-based Commons, how might a reformed Senate respect this?

Most current Senate reform proposals recommend an upper house whose political complexion would be different from that of the Commons. In some models this would be achieved through the use of equal provincial representation in the upper house to offset the heavy concentration in the Commons of Members of Parliament from central Canada. Practices would also be instituted to lessen the possibility of party control. The potential for conflict, and possibly deadlock, between the two houses would be high and naturally, therefore, the question turns to what powers the upper house would have to enforce its perspective. Proposals range from a limited right to delay or temper actions by the Commons to a power of absolute veto and the right to initiate its own legislative proposals. Each of these proposals has a further range of alternative elements which would have to be carefully balanced. For example:

- The equal representation of provinces could be accompanied by a high threshold for consensus in the Senate. In our Constitution the amending formula requires either unanimity or seven provinces having fifty percent of Canada's population as the threshold for agreement.
- Votes on certain topics before the Senate could be cast as a block on behalf of a regional or linguistic group and the results assessed accordingly.
- The role of the Senate might vary depending on the subject of legislation before it. For example, our Constitution employs eight separate amending procedures to treat the wide range of different topics and interests contained in the Constitution.

- A consultative practice could be developed between the two Houses; for example, the Senate might perform a "pre-study" of draft legislation once the Cabinet has introduced it into the House which might lessen the prospect of a Senate veto being applied at a later stage.
- The Constitution allows provinces to opt out of a certain category of amendments even should a majority carry the amendment for the rest of Canada. Could there be equivalent provision for minority dissent in the Senate?

The foregoing discussion illustrates how existing constitutional practices could provide a basis for guidance. They are not intended to promote a reformed Senate that is a clone of past practices, but rather to suggest the element of constraint and balancing needed in any national undertaking.

- o **Can a second chamber be designed to represent particular interests effectively without undermining government based on the majority preference in the House of Commons?**
- o **What is the appropriate mechanism for tempering majoritarian decision making?**
- o **In what areas of legislative or executive action would input from the second chamber be required? In what areas would it be excluded?**
- o **How would disputes between the second chamber and the House of Commons be resolved?**

c) The Federal System

As noted earlier in this paper, Canadians are acutely aware that the actions of their national government are constrained by obligations to other governments in the international arena. So it is in domestic politics; accommodating eleven senior governments in the structure of Canada's federal system imparts constraints on the design and actions of Parliament. What could be the link between Senate reform and the condition of Canadian federalism?

From one perspective, Senate reform should not affect the dynamics of federalism; it does not touch upon the relations between governments but rather the expression of opinion from less populous regions within the federal parliamentary process. Moreover, Senate reform is concerned with defining the national interest, not subordinating the federal government to the provinces. Accordingly, the Senate should not become embroiled in the question of centralizing or decentralizing powers, as is federalism, but should rather attend to the fairer regional impact of exclusive federal powers.

In practice, however, the experience with upper houses in other federations suggests that the status of provincial (state) governments in national policy making is intimately linked to the status of elected Senators. Most commentators suggest the relationship is inverse: the more effective the state representative in the national legislature, the weaker the influence of the state government upon the national government. For this reason, advocates or opponents of Senate reform will often assess it in terms of the possible attenuation or enhancement of the provincial government perspective in national issues.

The linkage between these two conceptually distinct political systems is their one common element: political parties. We discuss this in Section IV, suffice it to say here that there is a possibility that Senators will not be a new voice in national politics but rather will acquire a national or provincial party perspective. Anticipating this affiliation, Senate reform advocates have transferred the practices of federalism to the proposed



upper house: most current reform proposals use the province rather than the region as the organizing principle for the allocation of seats in the new second chamber. Some promote a "federal principle" -- the equality of provinces -- as the weighting for seat allocation.

The preceding section of this paper asked whether the parliamentary system could contain a greater independence for legislators. The discussion here presumes a Senator's affiliation with ongoing provincial or federal politics and asks:

- o Could the operation of a reformed Senate make a contribution to national government independent and different from that of intergovernmental relations?**
- o How must the role of an upper house be related to the effectiveness of intergovernmental relations?**
- o Are there principles that underpin the federal system that should be reflected in any second chamber?**

Senate reform proposals have given considerable attention to the question of the Senate's unique contribution to national policy making. An assessment of whether a second chamber could play a distinctive role involves examining the likely perspective of Senators and the interests they would represent. There may well need to be an initial choice of whether Senators would be part of the provincial or national electoral process. Once a preference has been identified, a number of specific questions as to institutional design follow. For example:

- How would the electoral system influence the representation of parties or interests in the second chamber and the need to build coalitions among them?**

- If members were elected in province-wide constituencies at the time of provincial (or municipal) elections, would they have sufficient focus upon and responsibility to national issues?
- Would a fixed term for members and a prohibition on entering cabinets make membership in the second chamber sufficiently accountable or attractive?

These examples suggest general questions of institutional design and highlight the important implications of how these questions are resolved.

- o **What electoral system should be adopted?**
- o **What is the appropriate size of constituencies?**
- o **What is the appropriate length of members' terms and when should elections be held?**

#### **IV PARTIES AND A NEW SECOND CHAMBER**

The above discussion has dealt with the objectives of a new second chamber in the context of fundamental values and the requirements of the parliamentary and federal systems. Proposals for replacing the Senate cannot be adequately assessed without drawing on all three elements of this framework, for Senate reform would not occur in a vacuum. Furthermore, when these elements are combined in a new upper house, there is a likelihood of unintended consequences emerging from the design. Take, as an example, the possibility of party discipline being extended to a new upper house.

As noted earlier in this paper, the ability of a second chamber to represent particular interests may depend on the independence of its members from party discipline. If a second chamber is intended to be an instrument of regional accommodation, a

tendency to reflect partisan rather than regional concerns may be a serious problem. Party discipline is, however, a vital component of a parliamentary system whereby a very powerful executive is held accountable to the legislature. If party discipline is so pervasive, what is the prospect that Senators could be free of party ties? Would it matter if they were not?

- o Could a second chamber be designed that would be relatively independent of the constraints of national party discipline so as to present a distinctive voice in Parliament?**

If national party influence were diminished, could provincial party influence fill the void? Parties exercise discipline in part because they staff and fund the election process. Unless Senators were to be independently financed, it might be unrealistic to expect parties to be absent from the upper house. Thus, the measures to ensure independence from national parties might only ensure that provincial parties replace national influence.

- o If, in place of national party influence, Senators were subject to provincial party influence, what contribution could they make beyond expressing the preferences of provincial governments?**

A final line of questioning extends from the prospect of partisan influence. Assuming that Senators acquire either a national or provincial party allegiance, what would their relationship be to the executive level of Canadian federalism? Given one reform model, it can be expected in future that the federal government would claim that it had received a provincial response to its legislation by virtue of its passage through a new upper house based on provincial representation. Premiers of provinces that "lose" in such a process may state that the Senate outcome has no impact on the level of intergovernmental negotiations required. Conversely, when the federal government wants to cultivate intergovernmental relations, would it turn to Senators that in both policy and



administrative terms cannot commit a province? In short, would either federal or provincial cabinets treat Senate action as authoritative in our executive-centred parliamentary government?

Alternatively, assume that Senators could be independent of party affiliation and that the federal cabinet could find ways of dealing with a more dynamic and less predictable legislative process, i.e., that Parliament became more legislature-centred. Provincial government would remain unaltered: strongly executive-centred. How then would a more congressional form of politics in Ottawa, with a weaker executive, relate to the more traditional parliamentary style in the provincial capitals, with a stronger executive?

The main purpose of a reformed Senate might be to require federal consultation of opinion in less populous provinces. The question is whether Senators as individual legislators would be any more effective than Members of Parliament in negotiating a provinces' interests. If not, could the obligation to consult provinces be secured without the mechanism of a new upper house?

**o Will Senators in a reformed Senate actually be regarded as authoritative regional or provincial voices?**

\* \* \* \*

There is, then, a complicated interaction between basic features of institutional design and the various elements of the framework outlined in this paper. The reflection of values of unity in diversity and different conceptions of equality in a new second chamber would depend in part on the extent and nature of powers allocated to it. Greater powers might, in some circumstances, give expression to diversity at the expense of national unity and could exacerbate the tension between territorial, linguistic and individual (i.e., democratic) conceptions of equality. The powers of the second chamber would also be critical to the success of regional accommodation at the centre and the relationship

with the House of Commons. If a second chamber were too weak, it might be unable to fulfil the objective of tempering majoritarianism; if it were too strong, it could erode the effectiveness of the national government and undermine the confidence relationship between Cabinet and the House of Commons.

This web of interrelated considerations highlights the detailed study needed to design an appropriate replacement for the present Senate. The challenge of institutional design is to determine if there is a way to put all of the pieces together so that the desired objectives will be achieved.

## **V SUMMARY**

As this paper has illustrated, proposals to replace the Senate involve substantial institutional changes that highlight competing constitutional values, raise complex design problems and risk unintended consequences. It is essential, therefore, that the process of assessing these proposals involve detailed study and the consideration of a wide range of options before firm conclusions are reached. Furthermore, the lesson of recent experience with constitutional reform is that an open and public process of debate and consultation must precede any agreement on the details of an amendment.

This paper suggests a framework for beginning that process in Ontario by raising some of the questions to be addressed in this important constitutional enterprise.

## LIST OF QUESTIONS

### WHY A NEW SECOND CHAMBER?

- o *Given the acknowledged deficiencies of the current Senate, are there nonetheless reasons for retaining it?*
- o *Given the role of the House of Commons as the focal point of Canada's democratic system, is there a need for a new second chamber in Parliament?*
- o *Are there segments of Canadian society whose interests are not adequately represented or protected in the majoritarian setting of the House of Commons?*
- o *If so, what other institutional devices or practices are available to represent and protect these interests; in particular, could a second legislative chamber play such a role?*

### WHAT ROLE COULD IT PLAY?

- o *If consideration should be given to a new second chamber, what constituencies could it represent and what functions could it serve?*
- o *Does an upper house based, for example, on the "federal principle" of the equality of regions challenge the "democratic principle" of equality of citizens?*
- o *Are safeguards or limits on the role or powers upper house appropriate?*
- o *If so, do existing reform proposals contain adequate safeguards or limits?*

### A RESPONSE TO REGIONALISM

- o *Are the existing mechanisms of regional accommodation within Canadian federalism inadequate? If so, in what way?*
- o *Could any current defects in regional accommodation be cured by enhancing existing mechanisms or through new approaches other than the reform of a second legislative chamber?*
- o *What specific defects in regional representation are targeted by reform proposals? Will the desired objectives be achieved through a second chamber?*
- o *Would a regionally based second chamber complement (or detract from) existing means of regional accommodation in ways other than simply enhancing the representation of less populous regions?*



## THE CONTEXT OF NATIONAL VALUES

- o *If regional accommodation is to be improved by constitutionally entrenching this purpose in a new second chamber, what social and political values are likely to be affected?*
- o *Assuming that one or more values will be affected, will the net result be positive or negative?*
- o *Would a new second chamber adequately reflect the value of unity in a diverse nation?*
- o *How will the different aspects of equality that are important to Canadians be reflected in a second legislative chamber?*
- o *Would a regionally based second chamber enhance or hinder Canada's ability to respond effectively to the challenges of global interdependence?*

## PARLIAMENTARY PRACTICE AND A NEW SECOND CHAMBER

- o *Would a reformed second chamber be compatible with Canada's system of responsible parliamentary government; in particular could there be a move towards a more congressional system of government in Canada?*
- o *Can a second chamber be designed to represent particular interests effectively without undermining government based on the majority preference in the House of Commons?*
- o *What is the appropriate mechanism for tempering majoritarian decision making?*
- o *In what areas of legislative or executive action would input from the second chamber be required? In what areas would it be excluded.*
- o *How would disputes between the second chamber and the House of Commons be resolved?*

## FEDERALISM AND A NEW SECOND CHAMBER

- o *Could the operation of a reformed Senate make a contribution to national government independent and different from that of intergovernmental relations?*
- o *How must the role of an upper house be related to the effectiveness of intergovernmental relations?*

- o *Are there principles that underpin the federal system that should be reflected in any second chamber?*
- o *What electoral system should be adopted?*
- o *What is the appropriate size of constituencies?*
- o *What is the appropriate length of members' terms and when should elections be held?*

#### PARTIES AND A NEW SECOND CHAMBER

- o *Could a second chamber be designed that would be relatively independent of the constraints of national party discipline so as to present a distinctive voice in Parliament?*
- o *If, in place of national party influence, Senators were subject to provincial party influence, what contribution could they make beyond expressing the preferences of provincial governments?*
- o *Will Senators in a reformed Senate actually be regarded as authoritative regional or provincial voices?*







## **RETHINKING THE SENATE:**

### **BACKGROUND MATERIAL**

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- II     Constitutional Status, Composition, Powers and Functions of the Senate
- III    Summary of Selected Reports on Senate Reform
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## I BRIEF CHRONOLOGY OF SENATE HISTORY

This note summarizes important events in the history of the Canadian Senate and earlier second chambers in British North America. It borrows heavily from the "Chronology of Selected Events: The History of Upper Chambers in British North America and Canada" which appears in Strengthening Canada, Report of the Alberta Select Special Committee on Senate Reform (March 1985). Other sources relied upon include Robert A. MacKay, The Unreformed Senate of Canada, rev. ed. (Toronto: 1963) and R. L. Watts, "Second Chambers in Federal Political Systems" in Ontario Advisory Committee on Confederation, Background Papers and Reports: The Confederation Challenge, vol.2 (Toronto: Queen's Printer, 1970).

- Historically, the Senate's origins lie in the feudal constitution of medieval England.
  - The upper house, in 18th and 19th century constitutions, represented not faith in democracy but a hedge against it.
  - As part of a system of checks and balances intended to preserve freedom, the House of Lords was the bulwark of privilege and property.
  - Upper houses in British North America may be traced back to two sources: the influence of British institutions and the necessity for imperial control.
  - The early colonial constitutions provided for a governor and an appointed council of advisors who together performed the legislative, executive and judicial functions of government.
  - The next development was the election of representative assemblies by popular vote. As the primary legislative function was now exercised by these assemblies, the councils began to emerge as upper houses.
- 1791
- The Constitutional Act of 1791 provided for a legislative council, the first real upper house in British colonial history. The basic institutions of government were:
    - the legislative (popular) assembly;
    - the legislative council (precursor of the second chamber);
    - the executive council (forerunner of the Cabinet); and
    - the Lieutenant-Governor.
  - In Lower Canada, the legislative council was to protect the position of a racial minority; in Upper Canada, it was to represent a privileged class (property).
- 1837
- Rebellions in Upper and Lower Canada.

- 1838 • Lord Durham delivered his report to the British government. He advocated the granting of responsible government to the colonies of British North America and the union of Upper and Lower Canada.
- 1840 • The Act of Union refrained from instituting responsible government but did unite the provinces of Lower and Upper Canada under one government consisting of a Legislative Assembly and a Legislative Council. The members of the Legislative Council were appointed by the Governor General for life. Similar institutions of government existed in the Maritime colonies.
- 1848 • Responsible government was first instituted in British North America when the government of Nova Scotia resigned after losing a vote of confidence. This was followed by a similar event in the province of Canada.
  - The change to responsible government reduced the legislative council to impotence. There was nothing to keep the executive from resorting to the expedient of "swamping" the upper house with new members favouring the majority in the assembly.
- 1849 • The Rebellion Losses Bill, introduced to provide compensation for property lost during the Lower Canada rebellion, was opposed in the second chamber. Lord Elgin appointed 12 new councillors who helped to defeat council's opposition and passed the measure. The Canadian Parliament was therefore effectively a single chamber.
- 1856 • Parliament of the united province of Canada passed a bill providing for a council of 48 members, 24 from each province, elected for a term of eight years with one-fourth retiring every two years.
  - The council tended to replicate the assembly and because it was smaller in size and composed largely of prominent citizens, over time it might have overshadowed the assembly. Consequently, when federation was under discussion there was considerable doubt about the desirability of a second elected chamber.
- 1864 • A coalition government was formed in the united province of Canada between Conservatives and some Reformers pledged to end the governmental impasse in Canada through fundamental constitutional change.
- Sept. 1-16 1864 • The Charlottetown Conference was held to discuss Maritime union. With the addition of delegates from Canada, the discussions were broadened to include a wider federation. It was agreed that any union would require a strong national government but with guarantees for provincial rights and interests.



Oct.10-26

1864 • The Quebec Conference included delegates from Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Upper and Lower Canada. It produced the Quebec Resolutions which were to form the basis of the new constitution for Canada including an appointed Upper House styled the Senate.

1864-1866 • In the Canadian legislature, where the coalition government was in secure control, the Quebec Resolutions were accepted without change. Prince Edward Island and Newfoundland rejected the Quebec Resolutions outright.

- Amid much political manoeuvring, the legislatures of Nova Scotia and New Brunswick never accepted the Quebec Resolutions. They did, however, appoint delegates to discuss this plan of union in cooperation with Great Britain and Canada in the Westminster Palace Hotel in London.

Dec.10-25

1866 • At the Westminster or London Conference, delegates from Nova Scotia, New Brunswick, the Canadas and Great Britain produced the London Resolutions which were transformed into the British North America Act, to be renamed the Constitution Act, 1867.

1867 • The Constitution Act, 1867 created a 72-member Senate consisting of three divisions (Ontario, Quebec, and the Maritime Provinces) each having 24 members.

1864-1867 • The intentions of the Fathers of Confederation can be summarized as follows:

- The key to federation lay in securing adequate guarantees for the protection of provincial and sectional rights.
- Representation by population in the lower house was reluctantly accepted by Quebec on the condition that there be equality of the three regions (Ontario, Quebec, the Maritimes) in the upper house. The record of the confederation debates suggests, however, that the Fathers understood that provincial and sectional rights would be protected primarily by appropriate cabinet appointments.
- Although ostensibly its first duty was to represent provincial and sectional interests, the Senate was intended:
  - to protect the people against itself;
  - to guard against hasty or ill-considered legislation by the Commons;
  - to be the "House which has the sober second-thought in legislation" (per J.A. Macdonald); and
  - to represent conservatism and property.

- 1870 • The Manitoba Act, 1870 provided for two additional Senators.
- 1871 • The Imperial Order In Council, admitting British Columbia to the union, provided for three additional Senators.
- 1873 • The Imperial Order In Council, admitting Prince Edward Island to the union with Canada, provided for four Senators for that province. It also reduced the representation of Nova Scotia and New Brunswick from 12 each to 10 each (s.147 of the Constitution Act, 1867).
  - Prime Minister Alexander Mackenzie was rebuffed by the British Government when he requested permission to add to the number of Senators. He was informed that the so-called "deadlock provision" would only operate if there was persistent obstruction and this was not the case.
- 1882 • Census results led to the addition of another Senator for Manitoba.
- 1887 • Two Senate seats were given to the Northwest Territories.
- 1892 • Census results led to the addition of a fourth Senator for Manitoba.
- 1903 • The Northwest Territories representation was raised from two to four.
- 1905 • The Alberta Act, 1905 and the Saskatchewan Act, 1905, which created both Alberta and Saskatchewan, provided four seats each to the new provinces; however, the Northwest Territories' seats were eliminated. The total number of Senate seats was then 87.
- 1915 • The Constitution Act, 1915 amended the Constitution to provide for a fourth senatorial division of 24 members, consisting of the four western provinces which would then have 6 Senators each. The Senate would now consist of 96 members. This fourth division would also stand as a distinct entity in any deadlock between the Commons and the Senate; any increase in Senate membership would require an equal increase in each division.
- 1929 • The Judicial Committee of the British Privy Council overturned a decision by the Supreme Court of Canada to declare that women were "persons" under the Constitution and could therefore be appointed to the Canadian Senate.
- 1930 • First woman Senator, Mrs. Cairine Wilson, was appointed by Prime Minister Mackenzie King.
- 1947 • The Senate amended its official procedures to permit a Minister, who is not a Senator, to appear on the floor of the Senate in support of government legislation.

- 1949 • Newfoundland was admitted to Canada by the Constitution Act (No.1), 1949. By the Terms of Union of Newfoundland with Canada Act, 1949, it received 6 seats in the Senate.
- 1965 • The Constitution Act, 1965 required all Senators appointed after that date to retire at age 75.
- 1969 • The position of Leader of the Government in the Senate was enacted; incumbents in this position have been members of the Cabinet and serve at the pleasure of the Prime Minister.
- 1970 • Provision for exercising the functions of Speaker during his absence was made by the Speaker of the Senate Act, 1970.
- 1971 • The Senate received permission to study a government white paper on tax reform and thereby initiated a "pre-study" procedure that permitted it to examine legislation which had been introduced in the House but not yet passed. Although such legislation could not be amended until officially introduced into the Senate, the Senators could offer recommendations and make their intentions known.
- 1975 • The Constitution Act, (No.2), 1975, provided one seat each to the Northwest Territories and Yukon for a current total membership of the Senate of 104.
- June 1978 • The federal government introduced Bill C-60 which proposed substantial reform of the Senate. As a result of sustained criticism from the public, the provinces and the parliamentary opposition, the government submitted a reference to the Supreme Court of Canada asking whether Parliament, by itself, had the authority to amend the powers and membership selection procedures of the Senate.
- Dec.1979 • The Supreme Court, in a unanimous decision, declared that the proposed actions would be ultra vires the national Parliament.
- Sep.1980 • The federal government proposed a Joint (Senate - House of Commons) Resolution to amend the Constitution of Canada. The objective was to "patriate" it from Britain and to add a Charter of Rights and an Amending Formula. One aspect of this amending formula would limit the Senate's veto on constitutional matters.
- Nov.1981 • A constitutional accord was signed by the federal government and the provinces, with the exception of Quebec, which accepted the "patriation" of the Constitution, a revised Charter of Rights, and an amending formula which limits the Senate's veto on constitutional matters to a suspensive veto of 180 days.

April 17

1982

- The Constitution Act, 1982 received Royal Assent.

1984

- The Senate abandoned the "pre-study" procedure for reviewing proposed legislation prior to its passage through the House of Commons.

June 3

1987

- First Ministers, meeting at the Langevin Block, agreed on the text of the Meech Lake Constitutional Accord and an accompanying political accord, both of which provide for the selection of Senators from lists submitted by the provinces. This was intended as an interim measure, pending agreement on more complete Senate reform.



## II CONSTITUTIONAL STATUS, COMPOSITION, POWERS AND FUNCTIONS OF THE SENATE

This brief note outlines the constitutional status, composition and powers of the Senate and discusses a range of possible functions and the extent to which they have been carried out in recent years. The classic examination of the Senate remains Robert A. MacKay, The Unreformed Senate of Canada, rev. ed. (Toronto: 1963), cited below as MacKay. Useful general discussions of the Senate can also be found in a number of the references listed in Section VI of the background material.

### 1. Constitutional Status

- the constitutional status of the Senate is defined in the Constitution Act, 1867 and through constitutional conventions; the relevant provisions in the Constitution Act, 1867 include:
  - s.17 - the Parliament of Canada shall consist of the Senate and the House of Commons
  - s.21 - establishes the number of Senators as 104
  - s.22 - defines the territorial divisions of the Senate, the number of seats to which each province is entitled and the 24 senatorial districts within Quebec
  - s.23 - sets the qualifications for Senators including age (30 years), status as a British subject, property and residence requirements
  - s.24 - provides for the appointment of Senators by the Governor General; by convention, these appointments are made only on the advice of the cabinet
  - ss.26-28 - these sections limit the number of Senators which may be appointed and provide for a special addition of Senators (which has never been used)
  - s.29 - Senators appointed before June 1, 1965 can retain their seats for life; those appointed thereafter must retire at age 75
  - ss.30, 31 - provisions for the resignation and disqualification of Senators
  - ss.32, 33 - provisions for filling vacancies and resolving questions as to qualifications and vacancies
  - s.34 - the Speaker of the Senate shall be selected by the Governor General; by convention, this is done on the advice of the cabinet
  - s.35 - the Senate quorum is 15 members

- s.36 - decisions in the Senate are taken by majority vote
- s.39 - Senators cannot be elected to the House of Commons
- s.53 - appropriation and tax bills must originate in the House of Commons
- the amending formulae in the Constitution Act, 1982 apply in the following ways to the Senate:
  - under s-s.42(1)(b) and (c), an amendment to the Constitution in relation to "the powers of the Senate and the method of selecting Senators" and "the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators" must be passed by the general amending formula (s-s.38(1))
  - s-s.38(1) requires approval of the amendment by resolutions of the Senate and House of Commons and by resolutions of the legislative assemblies of at least two-thirds of the provinces having at least 50 per cent of the population of Canada (the 7/50 amending formula)
  - note, however, that amendments under s-s.38(1) can be proclaimed without Senate concurrence if the amendment resolution is not passed by the Senate within 180 days after its adoption by the House of Commons and if, after the expiration of that period, the House of Commons again adopts the resolution; a period when Parliament is prorogued or dissolved does not count in the 180 days
  - under s.44, any other amendments to the Constitution in relation to the Senate can be made by Parliament alone; Senate approval is required for amendments under this section

## **2. Composition**

### **A. NUMBER AND REGIONAL DISTRIBUTION OF SEATS**

- prior to 1949, the division of seats was based on the equal representation of four regions: Ontario, Quebec, the four Western provinces and the three Maritime provinces
- each of these regions had 24 seats
- Newfoundland received six seats upon joining Canada and consequently the Atlantic region's total became 30 seats
- in 1975, the two territories received one seat each

- this brings the current total of seats to 104
- the provincial and territorial breakdown of these is: Ontario and Quebec 24 each; Nova Scotia and New Brunswick 10 each; Manitoba, British Columbia, Saskatchewan, Alberta and Newfoundland 6 each; Prince Edward Island 4; Yukon and Northwest Territories 1 each

## **B. APPOINTMENT**

- Senators are appointed by the Prime Minister and are eligible to sit until compulsory retirement at age 75
- under the terms of the Meech Lake political accord of June 3, 1987, Senators are to be selected from lists submitted by provincial premiers
- clause 4 of the political accord states:
  - 4. Until the proposed amendment relating to appointments to the Senate comes into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have been submitted by the government of the province to which the vacancy relates and must be acceptable to the Queen's Privy Council for Canada.
- this clause was intended to implement immediately the interim procedure for selecting Senators contained in clause 2 of the Meech Lake Accord's proposed constitutional amendment

## **3. Powers**

### **A. FORMAL POWERS**

- the Senate's legislative powers are formally equal to those of the House of Commons with the exception that expenditure and taxation bills cannot be introduced in the Senate
- all legislation must be passed in identical form by the House of Commons and the Senate before receiving royal assent and becoming law
- legislation amended by the Senate is sent back to the House of Commons which can either accept the amendment (or some variation of it) or pass the bill again in its original form

- there is no formal mechanism in the Canadian Constitution for breaking a deadlock between the Senate and the House of Commons
- while there has been some debate as to whether the Senate has the power to amend or delay money bills, in fact the Senate has repeatedly amended legislation of this type
- this practice has been accepted by the Commons which has, however, usually added "a futile claim that its acquiescence must not be considered a precedent" (Norman Ward, Dawson's The Government of Canada, 6th ed. (Toronto: 1987) p.165)
- since 1982, the Senate has been limited to a 180 day suspensive veto on constitutional amendments passed by the House of Commons

## B. EFFECTIVE POWERS

- although the Senate was granted formidable constitutional powers, it was never intended to be the equal of the House of Commons
- the preeminence of the House of Commons was ensured by its popular mandate and the fact that the Cabinet was responsible only to it
- in summarizing the intended powers of the Senate at the time of confederation, MacKay stated:

"It was assumed that its wide legal powers would in practice be blunted by the political fact that while the House of Commons would represent the nation, the Senate would have no such direct political mandate. It was to be in every sense a secondary chamber, able to exercise a moderating influence, but not to play a dominating or obstructive role in the government of the new nation." (MacKay, p.50)

- for much of this century the Senate has generally restricted itself to this secondary role, avoiding direct conflict with the popularly elected House of Commons
- on occasion, however, the Senate has made use of its constitutional powers to delay legislation or insist on amendments
- regardless of the other motives at play, there appears to be a correlation between Senate activism of this type and the existence of different partisan majorities in the two Houses of Parliament
- this is particularly evident in conflicts between the government and the Senate since 1984 and it is probably no coincidence that one must go back to the



Diefenbaker government to find other examples of the Senate challenging the will of the House of Commons

- thus, it uncertain whether, or to what degree, the traditional deference of the Senate will be maintained in the face of partisan conflict with the House of Commons

#### **4. Functions**

A considerable range of functions has been suggested for the Senate and its success in exercising these has varied widely. The following discussion summarizes the most important of these.

##### **A. REGIONAL REPRESENTATION**

- according to MacKay: "The key to federation lay in securing adequate guarantees for the protection of provincial and sectional rights." (MacKay, p.36)
- it is clear that the Senate was intended to counter the fear that certain regional interests, notably those of Lower Canada, would be swamped in a parliament based solely on representation by population
- the Senate's role in this regard was reflected in equality of regional representation
- even at the time of confederation, however, the Senate was not viewed as the principal means of protecting regional interests
- these interests were to be protected primarily through the federal division of powers as interpreted by the courts and through regional representation in the Cabinet
- in fact, the Senate has not functioned as an effective vehicle of regional or provincial representation
- MacKay stated that: "The Senate ... has rarely been appealed to as the champion of provincial or sectional rights and, even when appealed to, it has not consistently supported claims to such rights." (MacKay, p.113)
- this record may be due to a number of factors including the selection of members by the federal government largely on the basis of partisan connections, the absence of accountability to regional (or any) constituencies and the inherent lack of legitimacy of an appointed body challenging the will of the House of Commons

## B. REPRESENTATION OF CONSERVATISM AND THE INTERESTS OF PROPERTY

- Senators are required to own \$4,000 in unencumbered real property in the province from which they are appointed
- at the time of confederation, this represented a significant property qualification and reflected a philosophy expressed by John A. Macdonald as follows: "The rights of the minority must be protected, and the rich are always fewer in number than the poor."
- the weighting of Senate membership towards the particular interests of business, suggesting that the representation of property may continue to be a role played by the second chamber, has been identified in two recent discussions of the Senate
  - see: Colin Campbell, The Canadian Senate: A Lobby from Within (Toronto, 1978); John McMenemy, "Business Influence and Party Organizers in the Senate Imperil the Independence of Parliament" in Paul Fox, ed., Politics: Canada, 5th ed. (Toronto, 1982)
- whatever the actual consequences of the over-representation of certain interests within the Senate, there is clearly no principled basis in modern Canadian democracy for the use of the Senate to grant a privileged position to property interests in the legislative process

## C. "SOBER SECOND THOUGHT"

### 1. The Review of Legislation

- the original view of the Senate as a chamber of "sober second thought" reflected the suspicion of popular democracy which also underlay the guarantee of representation for property interests
- the Senate was seen as a check on hasty and ill-considered legislation from the House of Commons
- while the anti-democratic aspect of this role is no longer compatible with principles of modern Canadian government, the Senate has contributed to the legislative process through the detailed examination of legislation and the correction of defects overlooked by the House of Commons
- this function has generally not involved issues of policy or principle but rather has focused on technical and drafting corrections and last-minute changes requested by the government
- while this role may not be as important as in earlier times when the government's legislative drafting skills were less adequate, it is nonetheless widely viewed as of continuing value

## 2. "Pre-Study" and Special Scrutiny

- the Senate's capacity to examine legislation was enhanced in 1971 when it adopted a practice known as the "pre-study" of legislation
- this process involved examining draft legislation before it had been approved by the House of Commons
- recommendations made at this stage were sometimes included in the legislation before it was adopted by the House of Commons
- in addition to ensuring earlier Senate input into the legislative process, this innovation allowed the Senate more time to engage in the "sober second thought" function of scrutinizing legislation without interfering unduly with the legislative timetable of the House of Commons
- the Senate's examination of legislation had often been truncated when it was called upon to rush through legislation at the end of a parliamentary session and, out of deference to tradition or partisan colleagues in government, complied with these requests
- the practice of "pre-study" was, however, dropped by Senator MacEachen following the change in government in 1984 and his appointment as Liberal leader in the Senate
- a noteworthy variant of this practice occurred in 1983 when, after introducing a controversial bill to establish the Canadian Security Intelligence Service into the House of Commons, the government created a special committee of the Senate under the chairmanship of Senator Michael Pitfield to conduct a detailed study
- this committee recommended important changes which resulted in the withdrawal of the original bill and the introduction of a new one which ultimately passed both Houses of Parliament

## D. INITIATION OF LEGISLATION

- although most legislation is introduced into the House of Commons first, bills which are not particularly controversial but which require detailed expert examination because of their complexity may be introduced first in the Senate and referred to a Senate Committee for examination
- private members' bills can also be introduced in the Senate and although there is little likelihood of one of these becoming law, they can provide an opportunity to debate issues of public concern

## E. PRIVATE BILLS

- another legislative function of the Senate is the consideration of private bills
- the Senate's role in handling these relieves the House of Commons of the time-consuming aspects of this responsibility
- although modern divorce and corporation statutes have reduced the need for private bills, they are still important for various charities and other organizations

## F. INQUIRIES

- in the last few decades Senate committees have examined various subjects and produced detailed reports
- these studies have included inquiries into land use in Canada, science policy, the mass media, poverty, employment and immigration, aging, consumer credit and delegated legislation
- the reports have generally been well received and a number of their recommendations have been reflected in legislation
- the quality of these investigations has been attributed to the following factors: the work of experienced and able Senators; the non-partisan nature of these inquiries; the absence of excessive exposure in the media; the time which Senators are able to devote to research, hearings and analysis; and the continuity permitted by the absence of an electoral time table

## G. CABINET REPRESENTATION

- while Canadian governments have not generally looked to the Senate as a significant source of Cabinet members, both the Clark and Trudeau governments relied on Senators to provide representation in Cabinet for regions which had few or no members in their House of Commons caucuses
- although the scope for this practice is limited by the convention that spending departments have a minister in the House of Commons to defend estimates, it has provided a means of ensuring regional balance in Cabinet when the governing party has failed to secure an adequate number of seats in all parts of the country



### III SUMMARY OF SELECTED REPORTS ON SENATE REFORM

This note summarizes the recommendations of a range of reports on Senate reform issued in the last 20 years. A more comprehensive list of reports appears in Section VI of the background material.

#### Reports Summarized

1. Special Joint Committee of the Senate and of the House of Commons, Report, (Molgat-MacGuigan), 1972
2. The Constitutional Amendment Bill (Bill C-60), June 1978  
[described in Honourable Marc Lalonde, Constitutional Reform House of the Federation, August 1978]
3. British Columbia's Constitutional Proposals, September 1978
4. The Task Force on Canadian Unity, A Future Together, January 1979
5. First and Second Reports of the Ontario Advisory Committee on Confederation, April 1978 and March 1979
6. The Constitutional Committee of the Quebec Liberal Party, A New Canadian Federalism, (Beige Paper), January 1980
7. Canada West Foundation, Regional Representation: The Canadian Partnership, prepared by Peter McCormick, Ernest C. Manning and Gordon Gibson, September 1981
8. Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Report, (Molgat-Cosgrove), January 1984
9. Alberta Select Special Committee on Upper House Reform, Strengthening Canada Reform of Canada's Senate, March 1985
10. Royal Commission on the Economic Union and Development Prospects for Canada, Report, (Macdonald Commission), vol. 3., 1985
11. Government of Newfoundland and Labrador, Constitutional Proposal An Alternative to the Meech Lake Accord, submitted to the First Ministers' Conference November 9th and 10th, 1989

Each report is summarized using the following organizational framework:

A. General Comments

B. Composition and Organization

1. Method of Selection
2. Constituency
3. Timing of Selection/Election and Term
4. Regional Basis of Representation
5. Internal Operation
6. Constraints on the Role of Parties

C. Jurisdiction and Powers

1. General Jurisdiction
2. Absolute Legislative Veto
3. Suspensive Legislative Veto
4. Other Powers and Responsibilities
5. Mechanism for Resolving Conflicts with the House of Commons

## SUMMARIES OF REPORTS

### 1. **Special Joint Committee of the Senate and of the House of Commons, Report, (Molgat-MacGuigan), 1972**

#### A. GENERAL COMMENTS

"We agree with witnesses who argued for reform of the Senate, not its abolition. The reasons which prompted the Fathers of Confederation to set up a bicameral legislative process in Canada are still valid today. Federal states in particular have found upper houses valuable. They allow greater regional representation at the level of the central government. The federal legislative process can and does benefit from regional representation." (p.34)

#### B. COMPOSITION AND ORGANIZATION

##### 1. Method of Selection

- Senators should continue to be appointed by the federal government
- as vacancies occur, one-half of Senators from each province and territory should be appointed solely by the federal government and the other half should be appointed from lists of nominees submitted by the appropriate provincial or territorial government

##### 2. Constituency

- Senators would be selected on a provincial or territorial basis

##### 3. Timing of Selection and Term

- Senators would be entitled to sit until compulsory retirement at age 70
- upon retirement, Senators would retain the right to title and precedence of Senators and the right to participate in the work of the Senate or its committees but would not be entitled to vote or receive the salary of Senators
- appointments would occur to fill vacancies

##### 4. Regional Basis of Representation

- there would be 130 seats in the Senate distributed as follows: Ontario and Quebec 24 each; Manitoba, Saskatchewan, Alberta and British Columbia 12 each; Nova

Scotia and New Brunswick 10 each; Newfoundland 6; Prince Edward Island 4; Yukon and Northwest Territories 2 each

5. Internal Operation

- no comments

6. Constraints on the Role of Parties

- none

C. JURISDICTION AND POWERS

1. General Jurisdiction

- "We recommend that the present veto power of the Senate be reduced to a suspensive veto.... This would ensure the continuation of a legislative role for the Senate in which regional forces could work, while at the same time ensuring that the House of Commons could not be thwarted indefinitely. Such a suspensive veto would recognize political realities in Canada, and would give to the Senate a more realistic constitutional base, as a non-elected body, from which to express its opposition to the elected government and the House of Commons." (p.34)

2. Absolute Legislative Veto

- none

3. Suspensive Legislative Veto

- the Senate would have a six month suspensive veto which would operate as follows: a bill may become law without Senate approval (1) if the House of Commons, having once passed it, passes it again no less than six months after it was rejected or finally amended by the Senate or, (2) if, within six months of third reading of a bill by the House of Commons the Senate has not completed consideration of it, and the House of Commons again passes it at any time after the expiration of the 6 months, but any period when Parliament is prorogued or dissolved shall not be counted in computing the six months



4. Other Powers and Responsibilities

- the government should be entitled to introduce in the Senate all bills, including money bills, but excluding appropriation bills, provided that money bills should be introduced by the leader of the government in the Senate on behalf of the government
- the investigative role of the Senate should be continued and expanded at the initiative of the Senate itself and the government should make use of the Senate in this way

5. Mechanism for Resolving Conflicts with the House of Commons

- none

## 2. The Constitutional Amendment Bill (Bill C-60), June 1978

**Note: this proposal is described in Honourable Marc Lalonde, Constitutional Reform House of the Federation, August 1978**

### A. GENERAL COMMENTS

"The government believes that it is necessary to replace the Senate because the country and Parliament need a second chamber that will function as a politically effective regional forum; that is, a forum in which different and competing regionally-based interests can be freely expressed, argued, and, if possible, reconciled by persons who are recognized by the public to be representative of their region." (p.3)

### B. COMPOSITION AND ORGANIZATION

#### 1. Method of Selection

- half of the members would be chosen by the House of Commons and the other half would be chosen by provincial legislatures
- membership would be proportionate to the share of popular vote received by each party which won at least one seat in the election for the relevant legislature
- territorial members would be selected by the Governor General in Council after each election of the territorial councils

#### 2. Constituency

- members would be identified by province and would be selected by either the provincial legislature or the House of Commons

#### 3. Timing of Election and Term

- the House of Commons would elect its share of members after each general election and each provincial legislature would likewise elect its members after each election in that province
- with each federal or provincial election, members of the second chamber elected by the relevant legislature would be subject to re-election or replacement

4. Regional Basis of Representation

- the House of the Federation would consist of 118 members with distribution based on four regions, adjusted to give additional weight to less populous provinces
- seats would be distributed as follows: Ontario and Quebec 24 each; British Columbia, Alberta, Nova Scotia and New Brunswick 10 each; Saskatchewan, Manitoba and Newfoundland 8 each; Prince Edward Island 4; Northwest Territories and Yukon 1 each
- the regional distribution would be: West 36; Ontario 24; Quebec 24; Atlantic 32; Northern Territories 2

5. Internal Operation

- no comments

6. Constraints on the Role of Parties

- multiplicity of federal and provincial parties represented in the new chamber would result in shifting alliances based on regional issues rather than partisan blocks
- the fact that legislators in the second chamber would not be directly elected would inhibit them from opposing the will of the directly elected House of Commons solely on partisan grounds
- the government would not have to command the confidence of the second chamber and so party discipline would be more relaxed

C. JURISDICTION AND POWERS

1. General Jurisdiction

- the House of the Federation would not be a confidence chamber and thus the tradition of responsible parliamentary government would be preserved
- "The government's objective is to create a forum for the free expression of regional views as part of Canada's Parliament, and one that will have significant political authority without challenging the supremacy of the House of Commons." (p.19)

2. Absolute Legislative Veto

- measures of "special linguistic significance" would require the approval of a double majority of members of the second chamber, that is a majority of English-speaking members and a majority of French-speaking members
- if this double majority is not achieved, the government could not present the bill for assent after the 60 day period (described below) unless it had first obtained a second favourable vote in the House of Commons with two-thirds of the voting members approving the bill
- no bill of special linguistic significance could qualify as an urgent bill and thus be subject to the expedited passage discussed below

3. Suspensive Legislative Veto

- after not less than 60 days have elapsed following a negative vote in the House of the Federation, the government could present the bill for assent by the Governor General, whereupon it would become law
- if the House of the Federation fails to deal with a bill passed by the House of Commons within 60 days, the bill could also be presented for assent
- consequently, the maximum suspensive veto would be 120 days if the House of the Federation deferred its negative vote until the 60th day after receiving the bill
- an urgent bill without a significant impact on federal-provincial relations and without special linguistic significance could, if authorized by a two-thirds vote in the House of Commons, be presented immediately for assent by the Governor General without the approval of the House of the Federation

4. Other Powers and Responsibilities

- approval of the House of the Federation would be required for appointments to the Supreme Court of Canada and for senior appointments to certain institutions established by Parliament such as crown corporations and regulatory bodies
- the House of the Federation would be able to initiate legislation except that money bills could not be initiated or amended by the House of the Federation



5. *Mechanism for Resolving Conflicts with the House of Commons*

- the rejection of a bill of special linguistic significance by the House of the Federation (double majority requirement) could be overridden by a two-thirds vote of the House of Commons

### 3. **British Columbia's Constitutional Proposals, September 1978**

#### A. GENERAL COMMENTS

- the primary purpose of the Senate should be to institutionalize provincial or regional participation in the national law-making process
- the secondary purpose should be to review legislation enacted by the House of Commons

#### B. COMPOSITION AND ORGANIZATION

##### 1. Method of Selection

- Senators should be appointed by provincial governments
- the leading Senator from each province would be a provincial Cabinet minister but there would be no other restrictions on who could be appointed

##### 2. Constituency

- members would represent provincial governments

##### 3. Timing of Selection and Term

- members would serve at the pleasure of provincial governments

##### 4. Regional Basis of Representation

- there should be 60 members with equal representation from each of the five regions: Atlantic, Quebec, Ontario, Prairie, and Pacific

##### 5. Internal Operation

- the leading Senator for each province would cast a block vote on matters where the Senate has an absolute veto but where there is only a suspensive veto the votes would be free

##### 6. Constraints on the Role of Parties

- none

C. JURISDICTION AND POWERS

1. General Jurisdiction

- the Senate would have considerable powers with an absolute veto in certain areas and a suspensive veto in others

2. Absolute Legislative Veto

- the Senate would have an absolute veto over most amendments to the Constitution, federal laws to be administered by the provinces (e.g. Criminal Law matters relating to censorship, drug offences and gun control), the use of the declaratory power and the use of the spending power in areas of provincial jurisdiction

3. Suspensive Legislative Veto

- the Senate would have a suspensive veto over all matters not subject to the absolute veto
- the House of Commons could override the suspensive veto by passing the same law again at its next session or after three months have elapsed, whichever comes first

4. Other Powers and Responsibilities

- Senate approval would be required for Supreme Court of Canada appointments and appointments to major federal crown agencies and federal commissions (e.g. Bank of Canada, Canadian Broadcasting Corporation, Canadian Transport Commission, Canadian Radio-Television and Telecommunications Commission)

5. Mechanism for Resolving Conflicts with the House of Commons

- on matters where there is a suspensive veto only, the House of Commons could override the Senate by passing the bill again at the next session or after three months

#### 4. The Task Force on Canadian Unity, A Future Together, January 1979

##### A. GENERAL COMMENTS

"The fourth alternative for the second chamber is one composed of provincial delegations appointed by the provincial governments. We have concluded in favour of such an institution, suggesting the name Council of the Federation, because it could combine the function of a second legislative chamber in which provincial interests are brought to bear, and a means of institutionalizing the processes of executive federalism (with their confederal character) within the parliamentary process." (p.97)

##### B. COMPOSITION AND ORGANIZATION

###### 1. Method of Selection

- members would be delegates of provincial governments acting under instruction
- provincial delegations would be headed by a delegate of cabinet rank
- federal government cabinet ministers would be non-voting members

###### 2. Constituency

- voting members would represent provincial governments

###### 3. Timing of Selection and Term

- voting members would sit at the pleasure of provincial governments

###### 4. Regional Basis of Representation

- no more than 60 voting members with provincial representation divided roughly in accordance with population and weighted in favour of smaller provinces
- membership of any province limited to one-fifth of the seats and a province which has at any time 25 per cent of the population (such as Quebec and Ontario) would be guaranteed a minimum of one-fifth of the seats
- this formula would produce the following distribution: Ontario and Quebec 12 each; British Columbia 8; Alberta 6; Prince Edward Island 2; all other provinces 4
- territories would qualify for seats upon becoming provinces



5. Internal Operation

- central government cabinet ministers would be non-voting members with the right to present and defend central government proposals before the Council and its committees

6. Constraints on the Role of Parties

- none

C. JURISDICTION AND POWERS

1. General Jurisdiction

"Unlike the existing Senate, the Council of the Federation ... would be an institution which could play a major part in ensuring that the views of provincial governments are taken into account before any central action which might have an impact upon areas of legitimate provincial concern occurs, thus inducing more harmonious federal-provincial relations." (p.99)

2. Absolute Legislative Veto

- the ratification of treaties, or parts of treaties, which deal with matters within provincial jurisdiction should require the approval of a majority of the provinces in the Council, on the understanding that legislative measures implementing such treaties would remain within provincial jurisdiction
- federal initiatives in areas of provincial jurisdiction that are based on the federal spending power, whether they are to be cost-shared or financed fully from federal funds (with the exception of expenditures related to equalization) should require a two-thirds majority in the Council
- a proclamation of a state of emergency, in either peacetime or wartime circumstances, should require, in addition to confirmation by the House of Commons, confirmation by the Council by at least a two-thirds majority

3. Suspensive Legislative Veto

- proposed federal legislation and articles of treaties deemed to belong to the category of powers described as concurrent with federal paramountcy should be subject to a suspensive veto of short duration

## Task Force on Canadian Unity, 1979

- proposed federal legislation deemed to belong to the category of powers described as concurrent with provincial paramountcy should be subject to a suspensive veto of a longer duration by the Council, except in the case of measures implementing bilateral agreements between the federal government and one or more provincial governments
- note: legislation and treaties within exclusive federal jurisdiction should not require the approval of the Council

### 4. Other Powers and Responsibilities

- federal appointments to the Supreme Court of Canada, to major regulatory agencies such as the Canadian Radio-Television Commission, the Canadian Transport Commission and the National Energy Board, and to central institutions such as the Bank of Canada and the Canadian Broadcasting Corporation, should require the approval of the appropriate committee of the Council
- the Council should be used as a forum for the discussion of general proposals and broad orientations arising from First Ministers' conferences and of matters of concern to the members of the Council itself
- the Council would not be able to initiate legislation except bills proposing constitutional amendments
- note: decisions of the Council would not be regarded as expressions of confidence or non-confidence since the government would be responsible only to the House of Commons

### 5. Mechanism for Resolving Conflicts with the House of Commons

- to determine the classification of a bill or treaty and hence the powers that the Council may exercise, a permanent committee should be created and be composed of the Speakers and some members from both the House of Commons and the Council

## 5. First and Second Reports of the Ontario Advisory Committee on Confederation, April 1978 and March 1979

### A. GENERAL COMMENTS

"The Committee discussed at some length the advantages and disadvantages of a second chamber. It was agreed that the present Senate should be abolished since it is ineffective in serving the purpose of regional representation for which it was designed. However, the Committee believes that an upper house, if properly designed, could play an effective role in our federal system. ... The Committee opted for a second chamber to replace the present Senate which would be appointed by and represent the provincial governments -in effect, a House of Provinces." (First Report, p.7.)

### B. COMPOSITION AND ORGANIZATION

#### 1. Method of Selection

- provincial delegates would be direct representatives of provincial governments and could include sitting members of provincial legislatures, premiers or cabinet ministers
- although the appointment of one or more permanent members would be desirable to maintain continuity, membership in the delegation could change depending on the issue being discussed in the second chamber
- representatives of the federal government would participate in the second chamber debates but would not have voting privileges

#### 2. Constituency

- delegates would represent their governments

#### 3. Timing of Selection and Term

- delegates would sit at the pleasure of their respective governments

#### 4. Regional Basis of Representation

- representation should be based on a combination of geographic and population criteria
- the following distribution is suggested based on a total of 30 (or a multiple of 30) votes: Ontario and Quebec 6 each; British Columbia 4; Alberta 3; Saskatchewan,

## Ontario Advisory Committee, 1978 & 1979

Manitoba, New Brunswick, Nova Scotia, and Newfoundland 2 each; Prince Edward Island 1

### 5. Internal Operation

- provincial delegations should be backed up by permanent provincial secretariats in Ottawa staffed with senior provincial civil servants

### 6. Constraints on the Role of Parties

- none

## C. JURISDICTION AND POWERS

### 1. General Jurisdiction

- "The basic principle here is that the degree of power of the House of the Provinces should vary depending on the degree to which proposed federal legislation affects or infringes upon regional/provincial interests." (Second Report, p.71)
- the House of Provinces would have no veto over legislation which is classified as having no substantial provincial interest, e.g. classifications in the federal civil service; it would have no power to initiate legislation

### 2. Absolute Legislative Veto

- the House of Provinces would have an absolute veto over legislation which encroaches on the jurisdiction of the provincial governments and is therefore of direct provincial interest, e.g., use of declaratory, pending and emergency powers, or legislation in areas of concurrent jurisdiction with provincial paramountcy

### 3. Suspensive Legislative Veto

- the House of Provinces would have a six month veto over legislation which is classified as having substantial provincial interest, e.g. freight rates



4. Other Powers and Responsibilities

- power to approve appointments to the Supreme Court of Canada
- power to approve appointments to federal regulatory bodies such as the National Energy Board, the Canadian Transport Commission, the Canadian Radio-Television and Telecommunications Commission, and the Bank of Canada
- Note: nominations to federal advisory and operating agencies such as the Canadian Broadcasting Corporation, the Canadian National Railways and the Economic Council of Canada would not be subject to the approval of the House of Provinces

5. Mechanism for Resolving Conflicts with the House of Commons

- classification of legislation would be determined by a joint House of Commons - House of Provinces rules committee
- disagreements could be resolved either through a reference to the Supreme Court of Canada or by giving the deciding vote to a chairperson, a position which could rotate between the Speakers of the two Houses

6. **The Constitutional Committee of the Quebec Liberal Party, A New Canadian Federalism** (Beige Paper), January 1980

A. GENERAL COMMENTS

- recommends abolition of the Senate and replacement with a new institution, the Federal Council, which is to be a special intergovernmental institution rather than a legislative assembly
- "If the Federal Council functions as it should, it might be possible to graft to it many of the co-operative mechanisms [of federal-provincial relations] now widely dispersed." (p.54)

B. COMPOSITION AND ORGANIZATION

1. Method of Selection

- delegates selected by provincial governments with the premier or his/her representative as the head of the delegation
- non-voting federal government delegates would be present to explain that government's point of view

2. Constituency

- voting delegates would represent provincial governments

3. Timing of Selection and Term

- provincial delegates would serve at the pleasure of their governments

4. Regional Basis of Representation

- representation proportionate to provincial populations with Quebec guaranteed at least 25 percent of membership and a reasonable degree of over-representation for smaller provinces
- suggested Federal Council of 80 members divided as follows: Prince Edward Island 2; Newfoundland 3; New Brunswick and Nova Scotia 4 each; Saskatchewan and Manitoba 5 each; Alberta 8; British Columbia 9; Quebec and Ontario 20 each

5. Internal Operation

- provincial delegations would cast block vote on instructions of provincial government
- federal government delegates would be present to explain their point of view but would not vote

6. Constraints on the Role of Parties

- none

C. JURISDICTION AND POWERS

1. General Jurisdiction

- while not a legislative body, the Federal Council would have the power to veto federal government initiatives in a number of areas

2. Absolute Legislative Veto

- Federal Council ratification would be required for: use of federal emergency power, use of federal spending power in fields of provincial jurisdiction; intergovernmental delegation of legislative powers; treaties concluded by the federal government in areas of provincial jurisdiction; and international and interprovincial marketing programs of agricultural products
- a special "dualist committee" would be created, half of the members of which would be francophone delegates; it would be convened when federal proposals affect this dimension of the Canadian reality and, in particular, it would ratify federal proposals on linguistic matters

3. Suspensive Legislative Veto

- none

4. Other Powers and Responsibilities

- Federal Council approval would be required for the appointment of judges to the Supreme Court of Canada and of the Chief Justice and the appointment of Presidents and Chief Executive Officers of federal bodies and Crown corporations of major importance (e.g. National Energy Board, Canadian National Railway, Air Canada)
- the dualist committee would ratify the appointment of Presidents and Chief Executive Officers of federal cultural bodies (e.g. Official Languages Commission, Canadian Broadcasting Commission)
- the Federal Council would provide advice on monetary, budgetary and fiscal policies of the federal government, mechanisms and operating formulas used for equalization and other matters having a substantial regional or provincial impact
- the dualist committee would give advice on linguistic and cultural matters in federal jurisdiction and would ensure that the federal public service reflects Canada's dualism at all levels

5. Mechanism for Resolving Conflicts with the House of Commons

- none



7. **Canada West Foundation, Regional Representation: The Canadian Partnership, prepared by Peter McCormick, Ernest C. Manning and Gordon Gibson, September 1981**

A. GENERAL COMMENTS

"It is not appropriate that the provincial governments be the only political focus for regional sentiments because this would imply that any assertion of regional feeling takes the form of pushing the federal/provincial balance of effective power further in favour of the provinces. The need is for institutions within the national government that accommodate regional interests by giving them an effective role in the process of making national policy. In the present context of Canadian political institutions, one can assert regional loyalty only by attacking Ottawa." (p.105)

B. COMPOSITION AND ORGANIZATION

1. Method of Selection

- election based on proportional representation and the ranking of candidates by voters in order of preference (single transferable vote)

2. Constituency

- same boundaries as provinces

3. Timing of Election and Term

- members would be elected at the same time as federal elections for terms the length of two parliaments
- one half of provincial representatives would seek election at each federal election

4. Regional Basis of Representation

- equal representation from each province of from six to 10 Senators
- Yukon and Northwest Territories to elect one or two members each

5. Internal Operation

- no comments

6. Constraints on the Role of Parties

- all votes in the Senate to be free votes
- political parties in the Senate would caucus separately from their colleagues in the House of Commons, although this would not be a constitutional prohibition
- Senators should caucus regularly on a cross-party regional basis
- constitutional provision against Cabinet ministers being members of the Senate
- single transferable vote system of election, where voters rank individual candidates in order of preference, would maximize opportunities for voters to choose among individual candidates and reduce role of parties in elections

C. JURISDICTION AND POWERS

1. General Jurisdiction

- an elected Senate should be formally recognized as an integral part of the formation of national policy

2. Absolute Legislative Veto

- amendments to the Constitution
- ratification of "extraordinary powers," including emergency power, declaratory power, spending power as exercised on matters within the legislative jurisdiction of the provinces and powers of reservation and disallowance
- approval required for all ordinary legislation with proviso that negative Senate vote could be overridden by a special majority of the House of Commons; the special majority was not specified in the report

3. Suspensive Legislative Veto

- none

4. Other Powers and Responsibilities

- power to introduce all bills except money bills
- power to ratify (i.e. veto) appointments to national tribunals, boards and agencies of special regional significance such as the Canadian Transport Commission, Canadian Radio-Television and Telecommunications Commission, the Canadian Wheat Board and the National Energy Board

5. Mechanism for Resolving Conflicts with the House of Commons

- House of Commons could override Senate veto on ordinary legislation with special majority
- creation of standing joint reconciliation committee to settle disagreements between the Senate and the House of Commons by the formulation of mutually acceptable compromises

8. **Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Report, (Molgat-Cosgrove), January, 1984**

A. GENERAL COMMENTS

"[T]he principal role of Parliament's second chamber should be to represent the sometimes diverse interests of the people of Canada's provinces and territories -- one of the main roles intended for it in 1867 -- and ... a major objective of reform should be to strengthen the Senate's capacity to fill that role." (p.11)

B. COMPOSITION AND ORGANIZATION

1. Method of Selection

- election of Senators by plurality vote in single-member constituencies

2. Constituency

- Senators should represent natural, identifiable communities
- although population would be one criterion in determining boundaries, more importance should be attached to geographic, community, linguistic and cultural factors than is the case for House of Commons constituencies
- Senate districts would not cross provincial or territorial boundaries

3. Timing of Election and Term

- Senators elected for non-renewable nine year terms
- elections for one third of seats every three years
- separate from House of Commons elections

4. Regional Basis of Representation

- 144 members in total distributed as follows: Ontario and Quebec 24 each; Prince Edward Island 6; Northwest Territories 4; Yukon 2; all other provinces 12 each

5. Internal Operation

- Senators would elect a Speaker after each triennial election



- government and opposition supporters in the Senate should elect their officers
- ministers, parliamentary secretaries and departmental officials would be allowed to appear in the Senate and its committees to explain their legislation

6. Constraints on the Role of Parties

- the restriction to a single term is intended to increase independence from parties and provide greater freedom to speak out as regional representatives
- the timing of elections separate from those for the House of Commons is also intended to increase independence and encourage candidates without party affiliation to seek election
- Senators would not be eligible for Cabinet positions
- the report recommends regional caucuses but this "should not prevent senators from attending the traditional party caucuses that are an essential part of the parliamentary process"
- one reason for rejecting proportional representation is that this electoral system would increase the role of parties in elections

C. JURISDICTION AND POWERS

1. General Jurisdiction

- the Senate should not be able to overturn a government
- Senate powers should be guided by the principle of maintaining the parliamentary system of responsible government

2. Absolute Legislative Veto

- requirement of double majority to pass a bill or portion of a bill having linguistic significance
- approval would be by an overall majority of all Senators that would include a majority of francophone Senators

- there would be a need to adopt a workable definition and procedure for resolving disputes to identify bills or parts of bills subject to the double majority
- on swearing in, Senators would declare whether they consider themselves francophone for purposes of the double majority

3. *Suspensive Legislative Veto*

- 120 sitting days for all bills except supply bills
- in practice, depending on time of year the maximum delay would be between seven and nine months

4. *Other Powers and Responsibilities*

- power to introduce bills other than money bills
- order in council appointments to federal agencies whose decisions have important regional implications should be subject to Senate ratification within a period of 30 sitting days; deemed ratification if Senate does not reject the appointment in that period

5. *Mechanism for Resolving Conflicts with the House of Commons*

- none

9. **Alberta Select Special Committee on Upper House Reform, Strengthening Canada Reform of Canada's Senate, March 1985**

A. GENERAL COMMENTS

"The Committee is convinced that only a directly-elected Upper House can have the trust of the Canadian people and that only a Senate with equal numbers from each province will uphold the principle of provinces being equal partners in Confederation as recognized by the amending formula accepted in the Constitution Act, 1982. It is evident that only a Senate with authority can balance federal decisions." (p.1)

B. COMPOSITION AND ORGANIZATION

1. Method of Selection

- election on a first-past-the-post system

2. Constituency

- constituency boundaries would be identical to provincial boundaries

3. Timing of Election and Term

- members would be elected for the life of two provincial legislatures
- three Senators should be elected during each provincial election with each voter being able to vote for three candidates

4. Regional Basis of Representation

- provinces should be equally represented in the Senate
- 64 members in total with six representing each province and two representing each territory

5. Internal Operation

- a speaker should be elected by a majority of the Senate at a specified time every four years and the Senate would, at any time, be able to initiate an election for speaker by a two-thirds vote

- each provincial delegation would select from its membership a chairperson who would sit at the pleasure of the provincial delegation
- the ten chairpersons and the Speaker would constitute the Senate Executive Council which would determine the order of business of the Senate, the appointment of committee chairpersons and the membership of committees

6. Constraints on the Role of Parties

- abolition of traditional opposition and government roles in the Senate and the positions of government and opposition leaders
- Senators should be physically seated by provincial delegations regardless of party affiliations
- the importance of provincial representation would be emphasised by the election of 10 provincial chairpersons who, along with the Senate Speaker, would constitute the Senate Executive Council
- Senators would not be eligible for appointment to the Cabinet

C. JURISDICTION AND POWERS

1. General Jurisdiction

- the primary purpose of the Senate should be to represent the regions (i.e. the provinces) in the federal decision making process
- the Senate should not be a forum for inter-governmental negotiations

2. Absolute Legislative Veto

- absolute veto over all legislation except supply bills
- subject to Commons override (see below under Mechanism for Resolving Conflicts with the House of Commons)
- all changes affecting the French and English languages should be subject to a double majority veto, i.e. a majority of all Senators and a majority of French-speaking or English-speaking Senators, depending on the issue



3. Suspensive Legislative Veto

- 180 day suspensive veto on constitutional amendments

4. Other Powers and Responsibilities

- power to initiate non-money legislation and supply resolutions relating to the Senate's own operational budget
- obligatory ratification of all non-military treaties
- power to amend all legislation with the House of Commons ; obliged to consider amendments
- the Senate should continue to act as a body of "sober second thought"

5. Mechanism for Resolving Conflicts with the House of Commons

- a simple majority vote of the House of Commons would be sufficient to override a Senate "veto" on a money or taxation bill
- the House of Commons could override any other Senate veto or amendment by a vote that is greater in percentage terms than the Senate vote to reject or amend the legislation
- the characterization of whether a bill is a money or taxation bill should be carried out by joint agreement of the Speakers of the House of Commons and the Senate in accordance with the British definition of a supply bill

10. **Royal Commission on the Economic Union and Development Prospects for Canada, Report, (Macdonald Commission), vol. 3, 1985.**

A. **GENERAL COMMENTS**

"This Commission proposes radical reform of the Senate, but not its abolition. We take this position for three reasons. First, our priority is to promote Parliament as the principal forum for public debate in Canada; to abolish the Senate would be a move in the wrong direction. Secondly, we wish to see the reconciliation of national and regional interests in Parliament, and we believe that the Senate can make a major contribution to that end. Thirdly, although there have been endless suggestions for reform of the Senate and a good deal of public support for reform, political and institutional self-interest has prevented the public will from being done. We think that this situation may be changing. We are of the opinion that there is renewed interest on the part of all the institutions concerned. Thus we are persuaded that, practically speaking, serious Senate reform is no longer a 'non-starter,' and we are convinced that for a more effective Parliament, it is essential." (p.87)

B. **COMPOSITION AND ORGANIZATION**

1. Method of Selection

- election of Senators by proportional representation

2. Constituency

- elections in six-member constituencies
- allows for the effective operation of proportional representation but also recognizes regions within certain provinces (Ontario and Quebec would have four constituencies; all other provinces except Prince Edward Island would have two)

3. Timing of Election and Term

- all Senators to be elected simultaneously with the House of Commons and to serve for the same term as members of the House of Commons

4. Regional Basis of Representation

- 144 members in total weighted in favour of the less populous provinces
- Ontario and Quebec 24 each; Prince Edward Island 6; Yukon and Northwest Territories 3 each; all other Provinces 12 each;

5. Internal Operation

- no comments

6. Constraints on the Role of Parties

- through proportional representation and weighting of seats in favour of less populous regions, regional interests would temper, although not override, party interests
- "A reformed Senate must strengthen party government, not undermine it." (p.91)

C. JURISDICTION AND POWERS

1. General Jurisdiction

- "Our aim is to ensure regional sensitivity and to temper majority rule. It is not to override the vital principle of responsible government." (p.91)

2. Absolute Legislative Veto

- on matters of special linguistic significance, passage of a law would require the support of both a majority of the Senate and a majority of francophone members
- (no discussion of how these matters would be identified)

3. Suspensive Legislative Veto

- six month suspensive veto on all ordinary legislation
- the report raises in a general way questions of timing, use of special majorities and different classes of legislation with respect to the House of Commons passing legislation for a second time but reaches no conclusion on these points

4. Other Powers and Responsibilities

- the proposed Senate would do more than bring a regional focus to the appraisal of policy

## **Macdonald Commission, 1985**

- the Senate should continue to perform its role of applying "sober second thought" and improving legislation
- its role would also involve conducting inquiries, the control of the modern administrative state, the public airing of issues and other unspecified functions
- Senators would be eligible for membership in Cabinet

### 5. Mechanism for Resolving Conflicts with the House of Commons

- simultaneous elections for the Senate and the House of Commons would reduce the risk that differences in party majorities would produce stalemates between the two Houses



**11. Government of Newfoundland and Labrador, Constitutional Proposal An Alternative to the Meech Lake Accord, Submitted to the First Ministers' Conference November 9th and 10th, 1989**

Note: While this document is not a report on Senate reform, it includes in Appendix A "A Draft Constitutional Amendment to Reform the Senate of Canada." This Appendix sets out the precise wording for a proposed constitutional amendment implementing Senate reform and includes a series of end notes elaborating on the text.

**A. GENERAL COMMENTS**

"[T]he government [of Newfoundland and Labrador] shares the Manitoba Task Force's view of the urgency of Senate reform, and believes that Newfoundland and Labrador and all of the smaller provinces have little or no hope of ever achieving their rightful place in the Canadian federation until Canada has a Triple-E Senate - a Senate that is elected, has equal representation from all provinces and has power to ensure that its vote will be effective." (p.6)

**B. COMPOSITION AND ORGANIZATION**

**1. Method of Selection**

- Senators should be popularly elected according to procedures to be determined by the Parliament of Canada

**2. Constituency**

- senatorial districts are to be established by the Parliament of Canada

**3. Timing of Election and Term**

- Senators are to be elected for renewable six year terms with half of the Senate seats up for election every three years
- the date of Senate elections is to be constitutionally entrenched

**4. Regional Basis of Representation**

- each province would be represented by six Senators for a total Senate membership of 60; the end note to this proposal suggests that consideration could be given to a larger Senate with ten members from each province

## Newfoundland Proposal, 1989

- the territories would be given representation in the Senate only should they attain provincehood; the end note to the proposal acknowledges that an argument can be made for having one Senator from each of the territories

### 5. Internal Operation

- the Senate would be able to establish its own procedures for the election of the Speaker of the Senate and the conduct of its business
- Senators would not be eligible for Cabinet positions

### 6. Constraints on the Role of Parties

- the proposal does not contain formal provisions in this area although it is noted that the prohibition on Senators holding Cabinet positions is intended to retain the independence of the Senate from the House of Commons and the office of the Prime Minister
- the end note to the proposal that the Senate establish its own procedures, however, notes that the Senate could establish a non-partisan executive council made up of chairpersons of the 10 provincial delegations (as suggested by the Alberta Select Special Committee Report, Strengthening Canada Reform of Canada's Senate)
- this end note also states that the following procedures could be adopted: the seating Senators in provincial blocks instead of party groups; the requirement that all votes in the Senate be free votes; the caucusing of political parties in the Senate separately from their party colleagues in the Commons; and the caucusing of Senators on a cross-party regional basis

## C. JURISDICTION AND POWERS

### 1. General Jurisdiction

- the proposed Senate would operate as an effective voice for regional interests within the national Parliament
- the Senate would not be a confidence chamber and so could not require the resignation of the government

2. Absolute Legislative Veto

- the Senate would have an absolute veto over all legislation except for bills appropriating money solely for the ordinary annual essential services of the government

3. Suspensive Legislative Veto

- the Senate would have, in effect, a suspensive veto of 45 sitting days over bills appropriating money solely for the ordinary annual essential services of the government; a bill of this type could be proclaimed without Senate approval if the Senate had not either passed it or amended it in a manner agreeable to the House of Commons within 45 sitting days

4. Other Powers and Responsibilities

- bills other than those solely for the ordinary annual essential services of the government or for imposing any tax or impost may originate in the Senate as well as in the House of Commons; bills merely imposing fines or fees for licences or services would not qualify as taxation bills
- Senate confirmation would be required for the appointment of persons as chairperson, chief executive officer or director of any of the Crown Corporations, Boards or Commissions subject to the application of the federal Financial Administration Act

5. Mechanism for Resolving Conflicts with the House of Commons

- a joint standing committee known as the Reconciliation Committee, composed of ten Senators and ten members of the House of Commons elected by the respective Houses, would have the role of seeking mutually acceptable compromises for bills passed in one House and delayed, rejected or amended by the other





#### IV SUMMARY OF OTHER VIEWS ON SENATE REFORM

This note reviews briefly the proposals and arguments of a number of commentators on Senate reform.

##### Views Summarized

##### PROPOSALS FOR A NEW SECOND CHAMBER

1. Roger Gibbins, Senate Reform: Moving Towards the Slippery Slope (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983) (Discussion Paper No. 16)
2. Donald V. Smiley & Ronald L. Watts, Intrastate Federalism in Canada (Toronto: University of Toronto Press, 1985) (Macdonald Commission Study Volume 39)
3. Michael Crommelin, "Senate Reform: Is the Game Worth the Candle?" (1989) 23 U.B.C. Law Review 197
4. Gordon Robertson, A House Divided Meech Lake, Senate Reform and the Canadian Union (Halifax: The Institute for Research on Public Policy, 1989)

##### CRITIQUES AND QUESTIONS REGARDING A NEW SECOND CHAMBER

5. C.E.S. Franks, The Parliament of Canada (Toronto: University of Toronto Press, 1987) (Chapter 9 The Senate and Its Reform)
6. Jeffrey Simpson, "Comments" in The Canadian Senate What is to be Done? (Proceedings of The National Conference on Senate Reform, May 5-6, 1988) (Edmonton: Centre for Constitutional Studies)
7. Alan Cairns, "Comments" in The Canadian Senate What is to be Done? (Proceedings of The National Conference on Senate Reform, May 5-6, 1988) (Edmonton: Centre for Constitutional Studies)

Each proposal for a new second chamber is summarized using the following organizational framework:

A. Reasons for Senate Reform

B. Principles and Recommendations for Senate Reform

1. Institutional Design
2. Powers

C. Other Comments

Summaries of the critiques and questions consist of an outline of the principal arguments raised by each commentator

## Summaries

### Proposals for a new second chamber

1. **Roger Gibbins, Senate Reform: Moving Towards the Slippery Slope (Kingston: Institute of Intergovernmental Relations, Queen's University, 1983) (Discussion Paper No. 16)**

A. REASONS FOR SENATE REFORM

- the current Senate has many defects
- Canadian political institutions lack the capacity to handle, and indeed may help create, the regional stress that afflicts Canadian politics
- in particular, Canadian parliamentary institutions fail to reflect the federal realities of the Canadian political system and society, and as a consequence those institutions tend to exacerbate regional conflict
- a reformed Senate could enhance the quality of regional representation within national political institutions, by national politicians

B. PRINCIPLES AND RECOMMENDATIONS FOR SENATE REFORM

1. Institutional Design

- institutional legitimacy requires the direct popular election of regional representatives
- Senate elections should coincide with those held to elect the House of Commons
- party labels should not appear on the Senate ballot
- Senators should be elected to a term lasting the life of two parliaments, with one-half of a province's Senators being elected each general election
- Senators should be elected in large, single-member senatorial districts using the first-past-the-post system
- there should be a separate ballot for Senate elections
- sitting members of provincial legislatures should be eligible to run for the Senate without first resigning their provincial seats; upon election to the Senate, however, resignation from the provincial legislature would be required
- apart from the Government Leader in the Senate, cabinet ministers should not be drawn from the Senate

- seats should be allocated on the basis of weighted provincial representation based on a three tiered distinction between large, medium and small provinces (although Gibbins acknowledges difficulties of line drawing with this proposal)

## 2. Powers

- the principles that the House of Commons should remain the senior and more powerful legislative actor and the Senate should not have an unrestricted veto should be respected if Senate reform is not to lead to a full-fledged congressional system
- Gibbins rejects both a veto restricted to bills affecting regional concerns and a purely suspensive veto as unworkable
- while acknowledging that it too raises major problems, he suggests a general veto power subject to a deadlock breaking mechanism such as repassage of the legislation in question by a special (e.g. two-thirds) majority in the House of Commons
- Gibbins raises the issue of the Senate's power to amend legislation and suggests that some form of House-Senate conference committee would be essential to resolve disputes
- the Senate should not be a confidence chamber
- the power of legislative initiation would reside only with the House of Commons
- the Senate should have the power of confirmation over senior order-in-council appointments including appointments to the Supreme Court of Canada and to senior positions in regulatory agencies and crown corporations

## C. OTHER COMMENTS

- Gibbins also discusses the prospects for reform, identifying potential winners and losers
- potential losers include provincial governments generally, the provinces of Ontario and Quebec, existing Senators, and most existing political actors in Ottawa (especially backbench Members of Parliament and the Cabinet, to the extent that its grip on the legislative process is weakened)
- potential winners include the national government which might increase in stature and legitimacy within the federal system



2. **Donald V. Smiley & Ronald L. Watts, Intrastate Federalism In Canada (Toronto: University of Toronto Press, 1985) (Macdonald Commission Study Volume 39)**

A. REASONS FOR SENATE REFORM

- the current debate about Senate reform has been almost completely dominated by the issue of regional representation
- there are, however, other legitimate roles for a Canadian second chamber besides the protection of regionally specific values and interests
- one example is the function of a house of review

B. PRINCIPLES AND RECOMMENDATIONS FOR SENATE REFORM

1. Institutional Design

- a second chamber consisting of delegates appointed by the provinces (modelled on the West German Bundesrat) would be inappropriate for Canada since it would allow the provincial governments to block federal authorities in matters within the latter's exclusive jurisdiction
- Senators should be elected in province-wide constituencies using the single transferable vote system of proportional representation
- Senate elections should be held at different times from those for the House of Commons as this would enhance the Senate's visibility and perceived importance
- Watts and Smiley expect that party affiliation would be an important determinant of the conduct of elected Senators whatever institutional devices are established to frustrate these dispositions
- proposals to limit partisanship have their own disadvantages
- for example, if Senators are non-partisan in the sense of not participating in or abiding by the decisions of their parliamentary caucuses, regional imbalances in these caucuses could be increased if the party has a shortage of representatives from one or more regions in the House of Commons
- similarly, preventing Senators from joining the Cabinet would eliminate the opportunity of using the second chamber as a means of preserving regional balance in Cabinet when the government has few representatives from a particular region in the House of Commons
- Watts and Smiley reject equal representation of provinces and recommend a weighted system which would give some over-representation to smaller provinces

2. Powers

- there is little point in creating an elected Senate to introduce a significant element of intrastate federalism (i.e. regional representation at the centre) and then to make that almost meaningless by giving it only a relatively short suspensive veto over ordinary legislation in order to reconcile it with responsible government
- the Senate's veto power would apparently extend to all matters deemed to be of special regional significance
- the Senate itself would decide whether a matter is of regional significance with the exception of taxing and expenditure measures; government supremacy would thereby be preserved over supply measures to ensure that the executive retains the capacity govern effectively
- a number of possibilities exist for breaking deadlocks between the two chambers
- Watts and Smiley favour an override provision whereby a Senate veto of a measure of regional significance would be overcome if the bill were passed a second time in the House of Commons with a two-thirds majority
- an absolute veto over legislation of linguistic significance (with a double majority provision) might have some symbolic value but would probably amount to very little in operational terms
- an elected Senate should provide a public screening for prospective appointments of heads of a few crucial federal regulatory agencies and public corporations and also for nominations to the Supreme Court of Canada
- the house of review function of a second chamber is an important one which has been almost completely neglected in the current debate; although it is difficult to predict how well an elected Senate would perform this review role, this area is one where a second chamber could make an important contribution

C. OTHER COMMENTS

- Watts and Smiley caution that it is unrealistic to expect that Senate reform "would radically reduce the level of federal-provincial conflict and replace this with 'a regionally sensitive national consensus' on major federal policies" (p.26)
- given the difficulty of achieving comprehensive Senate reform, consideration should also be given to improving the existing Senate

- a clear change in the manner of appointment could increase the Senate's credibility
- in addition, consultation between the Prime Minister and native leaders would be appropriate for certain appointments
- the anachronistic property qualification should be abolished
- the Senate should select its own Speaker
- the power of the Senate, as well as the House of Commons, over subordinate legislation should be extended by allowing for disallowance by resolution
- Senate vacancies should be filled within six months after they occur
- conflict of interest rules should be developed regarding the involvement of Senators in legislation where they have a direct pecuniary interest

3. **Michael Crommelin, "Senate Reform: Is the Game Worth the Candle?" (1989) 23 U.B.C. Law Review 197**

A. REASONS FOR SENATE REFORM

- the Canadian Constitution is fundamentally flawed in that it attempts to embrace both the British concept of responsible government and the American concept of federalism
- the problem lies in the combination of the principle of cabinet responsibility to one confidence chamber (the House of Commons) and the federalism device of two differently constituted chambers with essentially equal legislative powers
- in response to the argument that the Canadian Senate lacks the legitimacy to take a major role in contentious political issues, Crommelin notes that political expediency rather than legitimacy led the Australian Senate to block government legislation and thereby trigger a constitutional crisis
- in addition, the Meech Lake appointment procedure goes a long way to removing the stigma of illegitimacy from the Canadian Senate

B. PRINCIPLES AND RECOMMENDATIONS FOR SENATE REFORM

1. Institutional Design

- Senators should be directly elected for a fixed term
- the case for equality of provincial representation in the Senate is overwhelming, whether based upon conceptual or practical grounds
- there is no need for a special deadlock breaking mechanism to resolve disputes between the two chambers
- Senators should not be eligible for cabinet posts; such appointments would hinder the effectiveness of the Senate's review function and their practical objectives could be achieved in other ways

2. Powers

- the Senate should have coordinate powers with the House of Commons in the enactment of ordinary legislation; a suspensive veto is not enough
- the Senate should be an equal participant in the enactment of appropriation and taxation legislation except that such legislation should originate in the House of Commons and the Senate should not be able to delay or block appropriation legislation for the ordinary annual services of government



- the Senate should be able to nullify delegated legislation
- it should also have a general power of investigation of the executive branch
- consent of the Senate should be required for international treaties
- the Senate should be able to block appointments to vice-regal, judicial and statutory offices

#### C. OTHER COMMENTS

- the powers presently enjoyed by the Senate, if exercised to the full, could wreak havoc upon the Canadian system of government
- given the stakes, Senate reform is an option worth pursuing

4. **Gordon Robertson, A House Divided Meech Lake, Senate Reform and the Canadian Union** (Halifax: The Institute for Research on Public Policy, 1989)

A. REASONS FOR SENATE REFORM

- Senate reform is necessary to remedy the imbalance in political power and influence that led Western Canada to feel that its interests were normally subordinated to those of the populous centre of Canada -- Ontario and Quebec

B. PRINCIPLES AND RECOMMENDATIONS FOR SENATE REFORM

1. Institutional Design

- Senators should be elected
- the first-past-the-post electoral system should be rejected for the Senate since it would simply replicate the distortions in the representation of voter preference found in the House of Commons
- a system of proportional representation would provide a second chamber which more accurately represents the range of voter opinion
- Robertson acknowledges the tension between the need for relatively large, multi-member constituencies for proportional representation to work effectively and the risk that Senators in such constituencies would tend to be drawn exclusively from more populous urban centres and would thus have a weakened identification with other regions of the province
- he suggests the use of the single transferable vote in three-member or six-member constituencies
- he also suggests possible means of reducing party control over the electoral lists used in this system
- Robertson recognizes the necessity of party participation in the electoral and legislative processes but also notes that the objective of genuine regional representation will be defeated if Senators reach almost exclusively on the basis of partisan advantage rather than regional view
- Robertson considers the advantages and disadvantages of various proposals for the term of Senators and the timing elections but reaches no firm conclusions
- Senators should be eligible for Cabinet posts since the advantage of this source of qualified, elected ministers from different regions outweighs the possible increase in partisanship in the Senate that would result
- equal representation for all provinces is inappropriate for the Canadian context

- Robertson endorses the distribution proposed by the Special Joint Committee of the Senate and House of Commons and the Macdonald Commission; this would give Ontario and Quebec 24 seats each, Prince Edward Island six, and all other provinces 12 seats

## 2. Powers

- the Senate's powers must be less than those of the House of Commons if it is to fit into the parliamentary system and if the possibility of deadlock between the two chambers (as occurred in Australia in 1975 when the Senate refused to pass the government's supply bills) is to be avoided
- achieving a balance which minimizes the risk of deadlock without producing a Senate too weak to voice and protect regional interests will require a careful combination of differing powers with respect to defined subject areas
- the government should not be responsible to the Senate
- the Senate should not have the power to block or delay appropriation bills
- however, a mere suspensive veto on ordinary legislation may be too limited a power
- alternatives include provision for override by the House of Commons or the convening of a joint session of the two chambers to vote on legislation blocked by the Senate
- special treatment for legislation of linguistic significance is desirable
- Special powers (such as ratification of appointments etc.) are neither fundamental nor necessary for an effective Senate in our parliamentary system

## C. OTHER COMMENTS

- Robertson argues that both Senate reform and the Meech Lake Accord are essential to resolve problems left over from the 19th century so that Canada can focus its attention and energies on the complex challenges of the 21st century
- furthermore, he proposes Senate reform as a way to break the Meech Lake deadlock without reopening the Accord

- in his view:

"A renewed federalism acceptable to Quebec, to the West and to the Atlantic provinces is within our grasp. The interest of Ontario is in helping to promote that accommodation in order to ensure the future stability of the country of which it has been the greatest beneficiary. The security and confidence afforded by successful agreement on these fundamental problems would enhance the prospect of resolving the more specific issues that remain." (p.52)



## **Critiques and questions regarding a new second chamber**

### **5. C.E.S. Franks, The Parliament of Canada (Toronto: University of Toronto Press, 1987) (Chapter 9 The Senate and Its Reform)**

- Franks raises a number of questions about the implications of a new second chamber and its potential to achieve the desired objectives
- a powerful second chamber reflecting provincial influences might lead to unwanted biases; in particular, advantaged economic interests which already influence provincial governments might gain more power
- most Senate reform proposals fail to provide adequate evidence that party discipline would not be strong in a new second chamber nor do they adequately explore its advantages and disadvantages in this context
- reformers assume that election would give Senators greater legitimacy but this might not be so if voter turnout for Senate elections is very low (as is the case with off-year elections in the United States)
- Senate reform will not alleviate federal provincial conflict because the basic factors underlying intergovernmental relations will not change
- in particular:
  - in a country with only ten provinces, each will retain political prominence
  - Senate reform will not affect the large area of provincial responsibility and its inevitable overlap with federal powers
  - the significance of the French fact in Canada and of Quebec as the representative of French Canada will be unaltered; the autonomy demanded by Quebec will continue to have spill-over effects for other provinces
  - the dominance of Cabinet in the parliamentary system and the importance of issues such as tax-sharing will continue to make interaction between governments rather than conflict resolution within the federal parliament an appropriate mode of action; Senate reform would reduce Cabinet dominance only at the cost of extraordinary tensions between the Senate and the federal government
  - political leaders at both levels will continue to gain prestige and media attention from confrontation
- Franks concludes that a strong case can be made that a reformed, regionally based upper chamber would become an enhanced forum for confrontation and impasse

- he also states that the problems and asymmetries of Canadian confederation will not be resolved by the technical fix of a new second chamber
- the present Senate does valuable work and could do a great deal more with some improvements
- abolition would be preferable to some of the recent, ill-considered, proposals

**6. Jeffrey Simpson, "Comments" in The Canadian Senate What is to be Done? (Proceedings of The National Conference on Senate Reform, May 5-6, 1988) (Edmonton: Centre for Constitutional Studies)**

- Simpson reviews a number of defects with the current Senate and states that partisanship prevents the Senate from discharging its two essential functions: representing regions and contributing effectively to the legislative process
- partisanship is not going to disappear regardless of what type of Senate is adopted because the workings of Parliament and the electoral process require organized political parties
- Simpson favours an elected Senate because it could reduce the scope for provincial premiers intervening in issues within federal jurisdiction; he questions, however, whether this would be the result given the enhancement of the premiers' national role provided by the Meech Lake Accord
- the risk is that with an elected Senate and the Meech Lake Accord, the people of each province would have Members of Parliament, elected Senators and the provincial premier each claiming constitutional backing and political legitimacy to speak for the province on national issues
- this would create confusion in voters' minds as to responsibility and undermine accountability which is the cornerstone of parliamentary democracy
- if an effective Senate as a voice of regional representation would not curtail the power of provincial premiers to intervene in federal affairs, the power of a reformed Senate should be restricted to a suspensive veto; this would allow for a fuller ventilation of regional perspectives without risking a complete deadlock with the lower house
- given that our federal system is already difficult to govern, adding an elected, fully effective and equal Senate without reducing complications elsewhere is not desirable
- Simpson is not in favour of the equal representation of provinces in a reformed Senate, noting that this equality principle already applies in First Ministers' conferences
- Simpson argues that the efficient running of the federation requires either an effective Senate as the major repository for regional input in federal matters - with a reduction in the national role of premiers - or a Senate with only limited powers if the premiers are to continue to have a significant national presence

7. **Alan Cairns, "Comments" In The Canadian Senate What Is to be Done? (Proceedings of The National Conference on Senate Reform, May 5-6, 1988) (Edmonton: Centre for Constitutional Studies)**

- Cairns does not present a critique of Senate reform proposals but does raise a number of fundamental points by way of clarifying the issues at stake
- he notes that the main focus of most proposals for Senate reform is to increase the provincial presence at the national level
- strengthening the regions is usually a code word for strengthening the provinces at the centre
- making the regional dimension more pervasive will logically make it more difficult to make policies at the national level for Canadians as undifferentiated members of a national community equally bearing citizenship rights
- although Senate reform is often proposed as a means of strengthening regional influence at the centre, what is really proposed is a redistribution of power between regions; strengthening the power of the West and the Atlantic provinces is necessarily done at the expense of the large population centres of Ontario and Quebec
- the principle of the equality of provinces necessarily means the unequal treatment of citizens of various provinces; provincial equality in a reformed Senate would mean that an individual citizen in a numerically smaller province would have more power in the national government than a citizen in a larger province
- careful attention must be paid to the political dynamics and other consequences flowing from institutional reform
- for example, every increase in power of the smaller and weaker provinces in the national arena increases the incentives for Ontario and Quebec to weaken the central government



## **V CHARACTERISTICS OF SELECTED SECOND CHAMBERS IN FEDERAL SYSTEMS**

This note summarizes the principal features of second chambers in four federal systems. While these examples provide interesting points of reference, considerable caution should be exercised in drawing conclusions for Canada based on the experience with second chambers in other countries.

### **Countries to be examined**

1. Australia
2. United States of America
3. Federal Republic of Germany
4. Switzerland

The characteristics of the second chambers will be outlined using the following organizational framework:

- A. General comments on the political system
- B. Composition and organization of the second chamber
  1. Method of selection
  2. Constituency
  3. Timing of election/selection and term
  4. Regional basis of representation
  5. Internal operation
  6. Role of parties
- C. JURISDICTION AND POWERS
  1. General comments on jurisdiction/role
  2. Legislative powers
  3. Other powers and responsibilities
  4. Mechanism for resolving conflicts with the other chamber

## Characteristics of Second Chambers

### 1. Australia

#### A. GENERAL COMMENTS ON THE POLITICAL SYSTEM

- parliamentary system
- federation with powers divided by subject matter between the federal and state governments
- the Prime Minister is the leader of the majority party or coalition in the House of Representatives
- the cabinet, chaired by the Prime Minister, forms the executive
- members of the House of Representatives are elected by preferential ballot (whereby voters rank preferences) in single-member constituencies

#### B. COMPOSITION AND ORGANIZATION OF THE SECOND CHAMBER

##### 1. Method of Selection

- election using a system of proportional representation where voters rank the candidates in order of preference (known as a "Single Transferable Vote System")
- candidates receiving a fixed quota of first preference are elected and surplus votes from these candidates' ballots are redistributed to others until the required number of candidates is elected

##### 2. Constituency

- each state is a single, multi-member constituency

##### 3. Timing of Election/Selection and Term

- members are elected for six year terms with half up for election every three years
- at one time, elections generally coincided with House of Representatives elections but this synchronization is not required and has broken down in recent years
- Senators representing the territories must seek reelection at every House of Representatives election (i.e. normally every three years)

- after a "double dissolution" of both Houses of Parliament (to be discussed below), all Senators must stand for election

4. Regional Basis of Representation

- the Senate has 76 members in total
- each of the six states is represented by 12 Senators and there are two Senators from each of the two territories

5. Internal Operation

- the Senate is organized along party lines into government and opposition groups

6. Role of Parties

- parties have played a dominant role in the Australian Senate
- in practice, almost all Senate votes are along party lines and obedience to party hierarchy is more important than state loyalties
- party discipline is enforced through the control of parties over the listing of candidates (of considerable importance given the electoral system) and through the political rewards, including possible cabinet appointment, available from the Prime Minister
- the Senate is also organized into government and opposition parties
- the adoption of proportional representation for the Senate added a new dynamic since the balance of power may be held by minority parties or independents
- when the balance of power is held by minority parties, the Senate has been particularly thorough and effective in scrutinizing legislation
- between 1948 and 1988 there have been only 9 years when the government party has had a majority of members in the Senate
- the dominance of party politics in the Senate has meant that state governments are the principal regional spokespersons in Australia

## C. JURISDICTION AND POWERS

### 1. General Comments on Jurisdiction/Role

- while the Senate's function generally involves the review of legislation introduced in the House of Representatives, its formal legislative powers are equal to those of the House of Representatives except with respect to money bills

### 2. Legislative Powers

- the Senate has an absolute veto over all legislation since a bill must be passed identical language by both Houses for it to become law
- as this power extends even to supply bills, it creates a potentially serious conflict with the parliamentary principle of responsible government, if this principle is taken to mean the right to govern of the party commanding majority support in the first chamber
- although the Senate cannot originate or amend money bills, it can exercise its veto over these bills by returning them unamended to the House of Representatives with a request for changes
- this amounts, in practice, to a power to amend
- Note: there has been a history of controversy over what constitutes a money or appropriation bill and over the practice of including extraneous items in money bills in an attempt to ensure passage through the Senate unamended

### 3. Other Powers and Responsibilities

- the Senate has an important role in the scrutiny of delegated legislation
- delegated legislation must be tabled in both houses of Parliament and either house can disallow this legislation by resolution
- Senate committees are also active in overseeing the operations of government departments and statutory authorities and in investigating issues of public policy

### 4. Mechanism for Resolving Conflicts with the other Chamber

- standing orders of each House provide for the exchange of messages concerning proposed amendments to bills and most disputes are resolved in this way



## **Australia**

- if agreement cannot be reached, each House may agree by resolution to a conference of at least five members from each to examine and report on the disputed matter
- if the Senate rejects a bill twice and the government is prepared to fight an election on the issue, there may be a "double dissolution" and all members of both Houses must face simultaneous reelection
- if deadlock continues after this, the Governor General may convene a joint sitting of both Houses (where Senators are outnumbered two to one) and the proposed legislation becomes law if passed by a simple majority

## 2. United States of America

### A. GENERAL COMMENTS ON THE POLITICAL SYSTEM

- the American system is organized along the principle of separation of powers with the President and executive outside of the legislative chambers
- terms of office for the President and legislators are fixed and do not depend in any way on the executive maintaining the confidence (i.e. the support of the majority) of legislators in one or both chambers
- although the President has some independent powers and need not maintain the support of members of the Senate and House of Representatives to remain in office, ensuring the passage of legislation through the two Houses is vital to many presidential initiatives
- in fact, most major legislation originates in the executive branch
- as a result, there is a constant process of negotiation and compromise between the executive and legislative branches of government
- the United States is a federal system with a constitutional division of powers; the balance, however, is tilted strongly in favour of the central government, primarily as a result of that government's financial resources and the judicial interpretation of certain of its powers under the constitution

### B. COMPOSITION AND ORGANIZATION OF THE SECOND CHAMBER

#### 1. Method of Selection

- Senators are elected by plurality vote (i.e. first-past-the-post)

#### 2. Constituency

- constituencies are state-wide

#### 3. Timing of Election/Selection and Term

- Senators are elected for renewable six year terms
- these terms are staggered with one-third of the Senate's seats contested every two years

4. Regional Basis of Representation

- states are equally represented with two Senators each, making for a total of 100 members of the Senate

5. Internal Operation

- the Senate is organized along partisan lines with minority and majority leaders selected for each party

6. Role of Parties

- Senators are nominated and run for election under party labels and organization within the Senate is on party lines
- nonetheless, party discipline is significantly weaker than in parliamentary systems
- this may be explained in part by the fact that the executive's independence from the legislature means both that it is not dependent on securing majority support and it has fewer means to discipline individual members
- since Senators are not obliged to follow the party line, there is considerable scope for advocacy on behalf of state and other interests and many issues are decided on the basis of shifting coalitions and logrolling

C. JURISDICTION AND POWERS

1. General Comments on Jurisdiction/Role

- the Senate was intended to be a counterweight to the popularly elected House of Representatives
- it is a powerful legislative body although in certain respects its functions differ from those of the House
- Note: the House alone may originate money bills, elect the President if no candidate receives a majority of electoral votes and impeach the President and other federal officials

2. Legislative Powers

- all legislation must be passed in identical form by the Senate and the House of Representatives before it can be signed by the President and become law

3. Other Powers and Responsibilities

- the Senate has the power to confirm important presidential appointments including nominations to the Supreme Court
- a two-thirds vote of Senators present is required to ratify an international treaty
- the Senate is also responsible for trying impeached officials and it elects the Vice-President if no candidate receives a majority of the electoral vote

4. Mechanism for Resolving Conflicts with the other Chamber

- when the Senate and the House pass a bill in different forms, a special committee is established consisting of members from both chambers appointed by the Speaker of the House and the President of the Senate
- if a majority of committee members from each chamber agree on a compromise, a "conference report" is taken back to both chambers for ratification
- if no compromise is reached the bill is effectively killed
- Note: legislation passed by both chambers may also be vetoed by the President and this veto, in turn, can be overridden by a two-thirds vote in each chamber



### **3. Federal Republic of Germany**

#### **A. GENERAL COMMENTS ON THE POLITICAL SYSTEM**

- West Germany has a parliamentary system of government
- the Chancellor is elected by secret ballot in the Bundestag or lower chamber and occupies a position similar to that of the Prime Minister in Canada
- ministers are appointed on the recommendation of the Chancellor and most are members of the Bundestag, although this is not a requirement
- governments have generally remained in office for the four year term of the Bundestag although the Chancellor can be replaced through a "constructive vote of no-confidence" whereby the Bundestag elects a successor by majority vote
- since this requirement makes it difficult to defeat a government on a confidence motion, West Germany might be referred to as a modified parliamentary system
- in addition, unlike the British parliamentary practice, the government is not obliged to resign or ask for a vote of confidence if it fails to gain approval for a major piece of legislation
- West Germany is a federal country divided into states called "Laender"
- West German federalism has a different principle for dividing powers from that found in North American and Australia
- rather than dividing powers by subject matters with each level of government independent within its own areas of responsibility, the pattern in West Germany is to allocate the majority of legislative power to the central government, leaving to the states most of the administrative responsibility to implement both federal and state laws and provide services directly to the public
- although many legislative powers are given to both levels of government concurrently, federal law takes precedence over state law

#### **B. COMPOSITION AND ORGANIZATION OF THE SECOND CHAMBER**

##### **1. Method of Selection**

- members of the Bundesrat, the West German second chamber, are directly appointed by state governments

2. Constituency

- members represent the state governments which appoint them

3. Timing of Election/Selection and Term

- every member can be replaced at the pleasure of the government which made the appointment
- membership changes following the election of new state governments or alterations in state coalition governments as well as through the retirement of individual members
- the Bundesrat has no legislative term and cannot be dissolved

4. Regional Basis of Representation

- the distribution of seats is weighted according to state populations
- this weighting is tilted in favour of the smaller states
- states with populations greater than six million have five seats; those with populations between two and six million have four seats and those with less than two million inhabitants have three seats
- the Bundesrat consists of 41 voting members and four non-voting members representing Berlin

5. Internal Operation

- each state casts its votes as a block according to the instructions of the state government; there are no individual votes
- decisions are taken on the basis of majority votes with the exception of changes to the Constitution which require a two-thirds majority
- most members are state premiers or heads of ministries

6. Role of Parties

- although members are selected to represent state governments, partisan conflict does occur within the Bundesrat
- nonetheless, the effectiveness of mechanisms for conciliation is illustrated by the fact that most federal legislation is uncontested by the Bundesrat
- Note: the partisan composition of the Bundesrat depends entirely on which parties or coalitions control state governments

C. JURISDICTION AND POWERS

1. General Comments on Jurisdiction/Role

- the role of West Germany's second chamber reflects the distinctive constitutional division of responsibilities whereby legislative power is concentrated at the centre but most administration is carried out by the state governments
- this makes a high degree of institutionalized coordination essential and the Bundesrat plays an important role in this regard

2. Legislative Powers

- the Bundesrat may amend or reject all legislation
- the Bundesrat has a right of absolute veto over constitutional amendments and laws affecting the states either in fiscal and taxation terms or with regard to their administration of federal laws
- consequently, any measure dependent on the states for implementation must be approved by the Bundesrat even if only a small portion of it may affect state interests
- in fact, more than 50 per cent of legislation is subject to Bundesrat veto
- Note: federal legislation must be submitted to the Bundesrat for preliminary comment before it is tabled in the lower chamber; detailed study by the Bundesrat occurs later in the legislative process
- in addition, most federal government ordinances having the force of law must be approved by the Bundesrat

- for legislation not subject to an absolute veto by the Bundesrat, the Bundestag may override an objection by the second chamber by passing the legislation again by either a majority vote, if the bill was rejected by a simple majority in the Bundesrat, or a two-thirds vote, if this was the proportion of Bundesrat members opposing the legislation
- the Bundesrat can prepare legislation on any matter in federal jurisdiction; draft bills must be sent to the federal government which is obliged to submit them to the Bundestag within three months

3. *Other Powers and Responsibilities*

- half of the members of the Federal Constitutional Court are selected by the Bundesrat
- the Bundesrat can nominate representatives to many official bodies with both executive and consultative functions
- state representatives have the opportunity to question the federal government on matters going beyond the legislative agenda
- the Bundesrat also decides whether the states have complied with their obligations in the execution of federal laws
- Note: the role of the expert state bureaucracies is significant in the Bundesrat; often replacing ministers during committee work, state bureaucrats bring considerable administrative experience to bear in the examination of legislation and the devising of practical compromises

4. *Mechanism for Resolving Conflicts with the other Chamber*

- the significant role played by the Bundesrat in the federal legislative process leads to extensive consultation between federal and state bureaucrats and politicians
- with its more limited administrative capacity, the federal government has recognized state expertise in this area with the result that the consent of the Bundesrat to legislation is generally obtained
- in the case of disagreement, the Bundesrat puts the bill before the Mediation Committee made up of 11 members from each chamber
- in committee deliberations Bundesrat members are not bound by directives



## **Federal Republic of Germany**

- any amendments proposed by the Committee are voted on by the Bundesrat
- as noted above, on legislation not subject to a Bundesrat veto, rejection by this chamber may be overridden by a majority or a two-thirds vote of the Bundestag

#### 4. **Switzerland**

##### A. GENERAL COMMENTS ON THE POLITICAL SYSTEM

- as in the United States, the Swiss political system reflects the principle of separation of powers
- the executive in Switzerland does not depend on the confidence of the legislative chamber(s) to remain in office
- members of the federal executive do not sit in either chamber and have a fixed term of office
- the executive is, however, selected by the two legislative chambers convened in a joint session
- Switzerland is a federal system with three major linguistic groups and two dominant religions
- powers are divided between the federal and cantonal (state) levels and Switzerland also has an important element of direct democracy through the procedures of initiative and referendum

##### B. COMPOSITION AND ORGANIZATION OF THE SECOND CHAMBER

###### 1. Method of Selection

- members are directly elected through a majority system
- Note: the method of selection is determined by each canton

###### 2. Constituency

- constituencies are canton-wide

###### 3. Timing of Election/Selection and Term

- elections are held every four years at the same time as those for the National Council (the first chamber)

###### 4. Regional Basis of Representation

- each canton has two representatives in the Council of States and each half canton has one

5. Internal Operation

- members of the Council of States may also hold a seat in their cantons' legislatures although they are forbidden by the constitution from voting on instructions

6. Role of Parties

- the Swiss system achieves a high degree of consensus and many major issues are resolved by referendum rather than solely by the legislative process
- the degree of consensus is illustrated by the fact that the federal executive includes representatives of the major parties

C. JURISDICTION AND POWERS

1. General Comments on Jurisdiction/Role

- the Swiss Council of States is a powerful chamber operating within a political tradition which places great emphasis on consensus and checks and balances

2. Legislative Powers

- the Swiss Council of States has the same constitutional powers as the first chamber

3. Other Powers and Responsibilities

- following elections, the two chambers meet in joint session to elect the executive known as the Federal Council

4. Mechanism for Resolving Conflicts with the other Chamber

- the Swiss constitution is silent on this issue
- the collegial nature of the executive, the use of referendum procedures to resolve disputes and the emphasis on consensus in Swiss politics combine to ensure smooth relations between the two chambers





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Note: This book contains brief essays on Senate reform by 19 political leaders and commentators. The contributions of **Jeffrey Simpson** and **Alan Cairns** are summarized in Section IV of the background material.











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